

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1935

No. 6554

SPECIAL CALENDAR

778

THE UNITED STATES OF AMERICA EX REL.
TUNGSTEN REEF MINES COMPANY, A COR-
PORATION, APPELLANT,

vs.

HAROLD L. ICKES, SECRETARY OF THE
INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED SEPTEMBER 17, 1935.

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United States Court of Appeals for the District of Columbia

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United States Court of Appeals for the District of Columbia

No. 6554.

THE U. S. EX REL. TUNGSTEN REEF MINES Co., a Corporation,
Appellant,

vs.

HAROLD L. ICKES, Secretary of the Interior.

a Supreme Court of the District of Columbia.

At Law.

No. 77687.

THE UNITED STATES OF AMERICA EX REL. TUNGSTEN REEF
MINES COMPANY, a Corporation, Petitioner,

vs.

RAY LYMAN WILBUR, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Review of the Decision of the Secretary
 of the Interior and for Mandamus.*

Filed February 7, 1930.

In the Supreme Court of the District of Columbia.

At Law.

No. 77687.

THE UNITED STATES OF AMERICA EX REL. TUNGSTEN REEF
MINES COMPANY, a Corporation, Petitioner,
vs.

RAY LYMAN WILBUR, Secretary of the Interior, Defendant.

The petition of the United States of America on the relation of Tungsten Reef Mines Company respectfully shows to the Court:

I. That relator, Tungsten Reef Mines Company, is a corporation organized and existing under the laws of the State of Nevada and having its office and principal place of business in the City of Los Angeles, in the State of California; that the defendant, Ray Lyman Wilbur, is the Secretary of the Interior of the United States, now residing in the District of Columbia, and is sued in his official capacity.

II. That this suit is filed under the Act of February 13th, 1929 (Public No. 728), for a review of, and in order to correct, errors of law committed by the Secretary of the Interior and/or his predecessors in that office in the consideration of claims filed under Section 5 of the Act of March

2, 1919 (40 Stat. 1272), and amendments thereto, for
2 losses sustained by Tungsten Reef Mines Company
by reason of producing or preparing to produce
tungsten.

III. That said defendant as Secretary of the Interior and his predecessors in office under said Section 5 of the Act of March 2, 1919, as amended, was and is authorized to adjust, liquidate, settle and pay net losses suffered by any firm, person or corporation by reason of producing or preparing to produce tungsten in compliance with the request or demand of the governmental agencies mentioned in said Act when such production was to supply the urgent needs of the nation in the prosecution of the war.

IV. That Tungsten Reef Mines Company between the dates of April 6th, 1917, and November 11th, 1918, in preparing to produce and in producing tungsten in compliance

with the request of the governmental agencies mentioned in the Act of March 2, 1919, to supply the urgent needs of the nation expended monies and incurred obligations in good faith for and upon property containing tungsten in sufficient quantities to be of commercial importance.

V. That as authorized by said Act of March 2, 1919, Section 5, Tungsten Reef Mines Company, within the time prescribed by the law, filed its claim with the Secretary of the Interior seeking and praying that an award be made to it under said Act of its net losses for expenditures made and obligations incurred by complainant in good faith upon property which contained tungsten as described in Section 5 of said Act. In said petition submitted on

3 said claim Tungsten Reef Mines Company set up the facts showing that it had made expenditures and incurred obligations which were incurred in good faith upon the purchase of property containing tungsten and the purchase of equipment for a mill for the concentration of the tungsten mined. The Secretary of the Interior directed his agents to investigate said claim, and, as shown by the report attached hereto, the same was investigated and it was found that the property was purchased for the purpose of producing tungsten and permanent improvements were made for the concentration of the tungsten ore produced.

VI. That in the said petition or claim filed as aforesaid this relator as part of his expenditures made and obligations incurred showed an expenditure for the purchase of property and an expenditure for the purchase of the equipment of the mill aforesaid.

VII. That hearings were held before the agencies established by the Department of the Interior for that purpose and the Secretary made an award for some of the expenditures made by relator but denied relator an award for said items of loss for purchase of property and costs of mill equipment on the pretext that no claim was made for such expenditures. A copy of his decision is attached hereto, made a part hereof and marked Exhibit A.

VIII. That it is true as was demonstrated by undisputed evidence that relator expended monies for the purchase of property and mill equipment and such items constituted net losses to relator and the same were denied for the sole reason that the Secretary of the Interior held as matter of law that such losses were not included within the provisions of the said Act.

IX. That thereafter, the Congress of the United States by the Act hereinbefore mentioned, approved February 13th, 1929, gave jurisdiction to this Court to review the final decision of the Secretary of the Interior upon any question of law which has arisen or which may arise in the adjustment, liquidation, settlement and payment of claims under said Section 5 of the Act approved March 2, 1919, and amendments thereto.

X. That in this case the present Secretary of the Interior, defendant herein, has refused to reopen the decisions of his predecessors in office and there has been a final decision of the Secretary of the Interior based upon the question of law, for it is not disputed that relator paid and lost monies in the purchase of property and mill equipment and in that it is claimed by defendant as a matter of law such losses are not reimbursable under the law.

XI. That the defendant and his predecessors in office erred as a matter of law in not finding that monies lost as aforesaid by relator to be such losses as were allowable under said Act of March 2, 1919, as amended.

XII. Wherefore, petitioner on behalf of the relator aforesaid prays:

5 1. That this Court review the final decision of the Secretary of the Interior and his predecessors in office upon the question of law involved and direct said Secretary, defendant herein, to make an award of such amount as the facts show is due for purchase of property and mill equipment.

2. That writ of mandamus be issued directing the defendant, Ray Lyman Wilbur, Secretary of the Interior, to take jurisdiction of the claim of relator for expenditures made and obligations incurred as hereinbefore set forth and to allow such sum as may be just and equitable therefor, and to adjust, and pay relator's net losses in the purchase of property and mill equipment.

3. That such other order or orders be entered as this Court may deem necessary under the law.

TUNGSTEN REEF MINES COMPANY,
By NELSON FRANKLIN,

Attorney-in-fact.

MATHEWS & TRIMBLE,
By J. C. TRIMBLE,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, SS:

Nelson Franklin, being first duly sworn, deposes and says that he is the agent and attorney-in-fact for Tungsten Reef Mines Company, relator in the foregoing petition; that the relator is without the District of Columbia; that he has read the above and foregoing petition and verily believes the facts stated therein to be true.

NELSON FRANKLIN.

6 Subscribed and sworn to before me this 6th day of February, 1930.

FLORENCE M. STEPHENSON,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires April 28, 1931.

EXHIBIT A.

JFS/HBR.

February 8, 1921.

Claim No. 938.

In the Matter of the Claim of the TUNGSTEN REEF MINES
COMPANY, Los Angeles, Calif. Tungsten.

The Honorable, the Secretary of the Interior.

DEAR SIR:

This is a claim for losses alleged to have been sustained in preparing to produce tungsten ore from certain mines near Hereford, Cochise County, Arizona.

Request to produce tungsten ore was made to individuals who organized the operation of the claimant company by E. S. Larsen, of the U. S. Geological Survey, on July 9, 1917, at the mines of the Standard Tungsten Mines Company. Request to produce tungsten ore was made in a letter of March 30, 1918, from Mr. Hugh W. Sanford, of the War Industries Board, addressed to the Standard Tungsten Mines Company, and also by E. S. Larsen, of the U. S. Geological Survey, on June 4, 1918, at the mines of the Tungsten Reef Mines Company, Mr. L. E. Porter, Secretary, and A. J. Clark, President, representing both the Standard Tungsten Mines Company and afterwards the Tungsten Reef Mines Company were recipients of the Government request to produce tungsten ore.

In May, 1918, Mr. A. J. Clark, L. E. Porter, and W. S. Fraser, as individuals, incurred the obligation to purchase the property which forms the basis of this claim. The claimant herein, the Tungsten Reef Mines Company, was formed to finance and operate the properties, and conveyance of the mines was made to claimant. A. J. Clark acquired 179,625 shares of the stock of the said company, out of 400,000 shares of the total authorized. From May 5, until November 11, 1918, preparations were made to mine the ore, and an old mill was constructed to adapt it to the concentration of tungsten ore. Only a small amount of concentrates was produced before November 12, 1918.

6½ This was later sold and the receipts therefrom were credited to this claim as ore sales. No claim is made herein for property purchased or permanent improvement. The only elements charged are the operating costs from May 5, 1918, to November 11, 1918.

The auditor for this Commission has set forth the following items as constituting the claim.

June 1918 to Nov. 11, 1918.

Mine labor and supplies Sched. 1.....		\$7,259.22
Mill labor and supplies Sched. 1.....		2,978.66
General Mine Expense Sched. 1.....		4,285.51
Los Angeles Office (includ. salaries of management)		
Sched. 2.....		5,043.12
Boarding House Expense.....	\$3,013.54	
Less deductions from payrolls.....	2,102.68	
		<u>910.86</u>
Flu Epidemic Expense:		
Dr. W. J. Froitzheim, U. S. A.		
3 trips to mine @ \$100.....	300.00	
15 trips to mountain 50.....	750.00	
Serum treatment.....	48.00	1,098.00
		<u>21,575.37</u>
Total operating costs.....		21,575.37
Less rentals received.....		<u>158.01</u>
Net operating cost for which claim is made.....		\$21,417.36
The auditor for this Commission sets forth the		
total expenditures as.....		\$21,417.36
The Commission disallows certain items and makes		
further deductions:		
From flu expenditures.....	\$525.00	
Management salary of A. J. Clark.....	1,341.67	
Legal Expense.....	205.00	
Incorporating expense.....	1,140.31	
Sales of ore produced before Nov. 12, 1918...	2,758.77	
		<u>5,970.75</u>
Net Loss.....		\$15,446.61

The item for management, salary of A. J. Clark, for \$1,341.67 included in Los Angeles office expense item, is

deducted from the claim for the reason that it is not chargeable under the War Minerals Relief Act. The manager, A. J. Clark, lived in Los Angeles but visited the property from time to time and all traveling expenses are allowed; the superintendent, L. E. Porter, was continuously at the mine and his salary is allowed. Mr. Clark was the owner of 179,000 shares of the stock of the company.

The Commission has uniformly held that where men work for themselves and are entitled to the profits of the enterprise that they do not charge themselves with salaries. The loss of any salary above the cost of subsistence is usually regarded as a failure to receive a profit and not such a loss as is contemplated by the Statute under which the claim is filed.

The Act expressly provides:

"That no profits of any kind shall be included in the allowance of any of said claims."

7 The men, however, who work for themselves in a business, generally take out of their business, funds upon which to subsist and charge them as a necessary expense of the business.

The Commission, however, has established a rule for its guidance, that where a claimant working for himself furnishes his own supplies, \$4.00 per day is a reasonable amount to allow for subsistence, but that where the supplies are furnished he is given \$3.00 per diem for subsistence. Here such allowance was made for the manager's (A. J. Clark) subsistence at \$4.00 in the claim of the Standard Tungsten Mines Co., No. 918.

The Commission therefore recommends that an award in this case of \$15,446.61 be made.

_____,
Commissioners.

Respondent's Answer to the Petition.

Filed March 8, 1930.

* * * * *

The respondent, Ray Lyman Wilbur, for answer to the petition in this case, says:

1-4. The respondent admits the allegations of paragraphs one, two, three and four of the petition.

5. Answering the allegations of paragraph five of the petition, the respondent says that the petitioner timely filed its claim under the provisions of the act of March 2, 1919 (40 Stat. 1272), for reimbursement of alleged *net losses* amounting to \$25,393.31 in producing tungsten ore from certain mines located in Cochise County, Arizona. In presenting its claim petitioner stated:

An analysis of the company's financial situation on Feb. 15th shows permanent investment as follows:

Paid on purchase price of property.....	\$37,500.00
Construction	9,871.73
Equipment	33,339.40
8 Livestock	1,292.60
Furniture & Fixtures—Los Angeles.....	152.00
Accounts Receivable	318.67
Material and Supplies.....	12,680.65
Cash on hand.....	2,195.88
Mine cash account.....	2,091.96
Operating costs to date.....	34,309.73

No claim is being made covering items of permanent assets, the only elements of charges being the operating costs from May 5, 1918 to Nov. 11, 1918 * * *.

We have not included itemization of equipment and machinery because we claim no loss on such equipment and machinery, in that, it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations.

6. Answering the allegations of paragraph six of the petition, the respondent denies that the claim presented as aforesaid included expenditures for purchase of property, and mill machinery and equipment.

7. Answering the allegations of paragraph seven of the petition, the respondent denies that petitioner's War Minerals claim included expenditures for purchase of property and mill machinery and equipment.

8. The respondent denies the allegations of paragraph eight of the petition.

9. The respondent admits the allegations of paragraph nine of the petition.

10. Answering the allegations of the tenth paragraph of the petition, the respondent says that a final decision was rendered by the Secretary of the Interior adjusting and

liquidating petitioner's claim. Respondent denies that petitioner paid and lost monies in the purchase of property and mill equipment, and respondent denies that in adjusting and liquidating petitioner's claim, the Secretary of the Interior held, as a matter of law, that losses in purchasing property and mill machinery are not reimbursable.

9 11. The respondent denies the allegations of paragraph eleven of the petition.

12. Answering the entire petition the respondent says that the record in support of War Minerals claim No. 938 shows that on or about May 7, 1918, petitioner purchased a group of tungsten mining claims located in Cochise County, Arizona. The property had theretofore been equipped and operated as a gold mine, but was found to be too low grade to pay. There was a mill on the property when it was purchased. Said mill was altered by petitioner and new machinery added. The claim, as originally presented, was for alleged *net operating losses* amounting to \$25,393.31. The claim was reduced by amendment to include operating losses amounting only to \$21,417.36. The claim, as thus presented, was heard, investigated and audited, and the net reimbursable losses were ascertained to be \$15,446.61. This amount was awarded by the Secretary of the Interior under date of February 10, 1921, and said amount was paid to and accepted by the petitioner as full and complete payment of its claim. The respondent says that, having stated its claim and having voluntarily accepted the settlement made, the petitioner is estopped from reopening the matter, and is concluded from saying that the Secretary of the Interior committed error of law in rejecting and disallowing certain items of alleged loss, when in truth and in fact no such items of alleged loss were included in the claim, but, on the contrary, were knowingly and intentionally omitted from said claim.

Having fully answered the allegations of the petition, the respondent asks to be hence dismissed, with costs.

RAY LYMAN WILBUR,
Secretary of the Interior.

10 DISTRICT OF COLUMBIA, ss:

Ray Lyman Wilbur, being first duly sworn, on his oath says that he has read the foregoing answer by him subscribed, and knows the contents thereof, and that the mat-

ters therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

RAY LYMAN WILBUR.

Subscribed and sworn to before me this 6 day of March, 1930.

[NOTARIAL SEAL.]

W. BERTRAND ACKER,
Notary Public in and for D. C.

E. C. FINNEY,

Solicitor, Department of the Interior.

O. H. GRAVES,

Assistant to the Solicitor,

Attorneys for the Respondent.

Order for Writ of Mandamus.

Filed January 15, 1932.

* * * * *

The relator and the respondent in this case having agreed that judgment for mandamus may be awarded herein; therefore, this 15th day of Jan., 1932, it is, by the court, considered and adjudged that a writ of mandamus do issue out of and under the seal of this court, directed to Ray Lyman Wilbur, as Secretary of the Interior, commanding him forthwith to proceed to ascertain whether the relator, on March 2, 1919, had incurred net loss by reason of the expenditures made in the purchase of property theretofore employed by it in producing tungsten in compliance with the request or demand of the Department of the Interior or other authorized Government agency to supply the urgent needs of the nation in the prosecution of the World War; and to ascertain the amount of interest that, at the time of the passage of the act of Congress of March 2, 1919, Chapter 94, had been paid or the obligation incurred by the relator for money borrowed and lost in producing and preparing to produce tungsten at the request or demand of the Department of the Interior or other authorized Government agency to supply the urgent needs of the nation in the prosecution of the World War, and for which in justice and equity the relator is entitled to receive reimbursement from the appropriations made by Congress for the payment of such losses; and to thereupon proceed with the final adjustment of the relator's claim, filed pursuant to the aforesaid act of Congress of March 2, 1919, Chapter 94, in accordance with the facts as determined by him.

And it is also considered that no costs be awarded in favor of either party to this proceeding.

PEYTON GORDON,
Justice.

MATHEWS & TRIMBLE,
By J. C. TRIMBLE,
Attorneys for Petitioner.
O. H. GRAVES,
Attorney for Respondent.

Supreme Court of the District of Columbia.

Wednesday, May 31, 1933.

Session resumed pursuant to adjournment, Hon. James M. Proctor, Justice, presiding.

* * * * *

12 Upon consideration of the motion filed herein, in each of the above entitled causes, for substitution of party respondent, it is ordered that said motion be, and the same is hereby granted, whereupon, Harold L. Ickes, Secretary of the Interior, is hereby made party respondent, in each of the above entitled causes, in the place and stead of Ray Lyman Wilbur, retired.

Motion to Vacate Order for Writ of Mandamus, &c.

Filed April 24, 1935.

* * * * *

Comes now the respondent, Harold L. Ickes, Secretary of the Interior, by his attorneys, and moves this court to vacate its judgment and order for writ of mandamus entered in this cause on the 15th day of January, 1932, upon each and every of the following grounds:

1. That said order is void because the court was without jurisdiction to enter the same;
2. That, although the act of February 13, 1929 (45 Stat. 1166), upon which this court's jurisdiction over War Minerals Relief claims depends exclusively, gives this court jurisdiction to review only the final decisions of the Secretary of the Interior on questions of law arising in the adjustment of claims filed before February 13, 1929, in the time and manner provided by the then existing law, the petition in this cause prayed that this court compel the Secretary of the Interior to allow and pay the net losses suffered by petitioner in the purchase of property and mill

equipment, which net losses the petitioner had not claimed and had expressly disclaimed in its War Minerals Relief claim theretofore filed with the Secretary of the Interior and which net losses had not, therefore, been denied
13 as a matter of law in the award theretofore made to petitioner by the Secretary of the Interior, wherefore this court lacked jurisdiction over the petition in this cause;

3. That this court had no jurisdiction to enter the said order in this cause, ordering an adjustment and award of net losses suffered by petitioner in the purchase of property and in the payment or incurring obligations to pay interest, wherefore said order in this cause is null and void and without legal effect whatsoever, and should, therefore, be vacated.

Respondent further moves this court to stay the issuance of the writ of mandamus authorized by the order of January 15, 1932, pending the disposition of this motion.

The attached affidavit of Harold L. Ickes, Secretary of the Interior, and the exhibits attached thereto, are submitted in support of this motion.

Wherefore, the respondent, Harold L. Ickes, Secretary of the Interior, prays that the order for writ of mandamus be vacated and the issuance of said writ be stayed pending the disposition of this motion.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior;
CHARLES FAHY,
First Assistant Solicitor,
Department of the Interior;
WILLIAM H. ABBOTT,
Assistant Solicitor,
Department of the Interior;
J. KENNARD CHEADLE,
Assistant Solicitor,
Department of the Interior;
Attorneys for Respondent.

We accept service of the attached pleading.

MATHEWS & TRIMBLE,
Atty.

J. C. TRIMBLE.

4/24/35—3:30 P. M.

14 *Affidavit of Harold L. Ickes, Secretary of the Interior*
Filed April 24, 1935.

* * * * * *

DISTRICT OF COLUMBIA, ss:

Harold L. Ickes, being first duly sworn, on oath says:

1. That he is the present Secretary of the Interior, and by substitution, respondent in the above-captioned cause of action.

2. That in said cause the relator, Tungsten Reef Mines Company, a corporation, of Los Angeles, California, filed a petition on the 7th day of February, 1930, by which petition it sought by writ of mandamus to compel the Secretary of the Interior to review its War Minerals Relief claim No. 938 filed under the act of March 2, 1919 (40 Stat. 1272), as amended; and that said petition for review was allegedly filed under the authority of the act of February 13, 1929 (45 Stat. 1166).

3. That said petition alleged that the relator expended money and incurred obligations in good faith for and upon property containing tungsten in sufficient quantities to be of commercial importance; and that a net loss was occasioned by these expenditures, which net loss was reimbursable under Section 5 of the act of March 2, 1919, as amended.

4. That the relator alleged that the Secretary of the Interior refused to reimburse the relator for said loss solely on the ground that as a matter of law such loss was not included within the provisions of the act.

5. That the Secretary of the Interior answered said petition, denying that the Secretary of the Interior ruled as a matter of law that the alleged loss in the purchase of
15 property was not reimbursable.

6. That the Secretary of the Interior further answering said petition alleged that no claim was made by the relator for reimbursement of a net loss suffered by it by reason of the purchase of property and mill machinery; and that such items were knowingly and intentionally omitted from the claim by the relator.

7. That on the 15th day of January, 1932, an order for writ of mandamus was entered by this court reciting that the same was awarded upon agreement of the parties; and that said order directed a writ of mandamus to issue to the

Secretary of the Interior ordering him to ascertain whether the relator on March 2, 1919, had incurred a net loss by reason of expenditures made on the purchase of property theretofore employed by it in production of tungsten and whether interest expense had been incurred on money borrowed and lost in production of tungsten, and to make an award for any net losses thus incurred.

8. That in the original claim and application (a certified copy of which is attached hereto as Exhibit "A") filed by the relator seeking reimbursement for an alleged loss of \$25,393.31, net losses incurred by reason of the purchase of property or by reason of interest expense were expressly disclaimed. That the relator stated in its petition for a hearing (a certified copy of which is attached hereto as Exhibit "B") filed as part of its claim:

"An analysis of the company's financial situation on Feb. 15th shows permanent investment as follows:

Paid on purchase price of property.....	\$37,500.00
Construction	9,871.73
Equipment	33,339.40
Livestock	1,292.60
Furniture & Fixtures-Los Angeles	152.00
Accounts Receivable	318.67
16 Material and Supplies	12,680.65
Cash on hand	2,195.88
Mine cash account	2,091.96
Operating costs to date	34,309.73

No claim is being made covering items of permanent assets, the only elements of charges being the operating costs from May 5, 1918 to Nov. 11, 1918 * * *.

We have not included itemization of equipment and machinery because we claim no loss on such equipment and machinery, in that, it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations."

That at the hearing held June 28, 1919, at which the relator presented its case before the War Minerals Relief Commission, the Secretary's agency, the officers of the claimant corporation again denied that it included in its claim items of permanent investment. (A certified copy of the pertinent part of the record of this hearing is attached hereto as Exhibit "C".) That at page 41 of the record of

the hearing held at Los Angeles, the following testimony was introduced:

"Mr. Carson: In the Tungsten Reef mines the claim is only for the overhead and actual expense of making test runs from the time of starting to November 11, 1918.

Commissioner Moore: You accept this statement as your version of it, Mr. Clark?

Mr. Clark: Yes, sir."

That the Mr. Clark there testifying was A. J. Clark, President of the Tungsten Reef Mines Company, this claimant and relator.

That further testimony of Mr. Carson recorded at pages 32 and 42 of the report of the hearing also disclaims any demand by the relator for reimbursement by reason of net loss suffered in the purchase of property.

9. That in making the award (a certified copy of which is attached hereto as Exhibit "E") to the relator, the Secretary of the Interior approved the findings of the War Minerals Relief Commission (a certified copy of which is attached hereto as Exhibit "D"), in which findings dated February 8, 1921, it was stated "No claim is made herein for property purchased or permanent improvements." That the award \$15,446.61 was approved by the Secretary and accepted by the relator.

10. That nearly six months after the entry of the order for writ of mandamus directing the Secretary of the Interior to review his final decision denying an award for property loss, the relator filed a claim for property loss on June 2, 1932 (a certified copy of which is attached hereto as Exhibit "F").

11. That on June 9, 1932, the Secretary of the Interior denied recovery on the ground that the purchase price of property was never a part of the original claim and that the filing of the second claim did not bring the claim for property within the act. (A certified copy of this decision of the Secretary of the Interior is attached hereto as Exhibit "G". That on December 16, 1932, the Secretary of the Interior denied a motion of relator for a rehearing, adhering to his decision of June 9, 1932. (A certified copy of this decision on the motion for rehearing is attached hereto as Exhibit "H".) That a second motion for rehearing was made December 27, 1933. That no award or finding of fact

has been made by the Secretary of the Interior on the second motion for rehearing.

And further, affiant sayeth not.

HAROLD L. ICKES.

Subscribed and sworn to before me this 24th day of April, 1935.

[NOTARIAL SEAL.]

W. H. REICHARD,

Notary Public in and for the District of Columbia.

My commission expires August 10, 1939.

We accept service of the foregoing.

MATHEWS & TRIMBLE,

Per J. C. TRIMBLE.

4/24/35. 3:30 P. M.

* * * * *

- 18 List of Exhibits certified from the records of the War Minerals Relief Commission in the claim of the Tungsten Reef Mines Company, No. 938.

Exhibit A—Original claim filed May 31, 1919.

Exhibit B—Petition for hearing filed as part of the claim.

Exhibit C—Extract from hearing on claim before War Minerals Relief Commission.

Exhibit D—Recommendation for award by the War Minerals Relief Commission.

Exhibit E—Award of the Secretary of the Interior.

Exhibit F—Amended claim filed June 2, 1932.

Exhibit G—Denial of additional award of June 9, 1932.

Exhibit H—Denial of motion for rehearing December 16, 1932.

United States of America,

Department of the Interior,

Washington, D. C.

April 5, 1935.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed are true copies of the originals as they appear upon the records and files of the Department of the Interior.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

T. A. WALTERS,

First Assistant Secretary of the Interior.

Return this questionnaire, when sworn to, together with two copies of same, to the War Minerals Relief Commission, Room 2151 Interior Department Building, Wash., D.C.

DEPARTMENT OF THE INTERIOR

Exhibit A

QUESTIONNAIRE

QUESTIONS TO BE ANSWERED BY THOSE CLAIMING RELIEF FOR LOSSES SUSTAINED
IN PRODUCING OR PREPARING TO PRODUCE MANGANESE, CHROME, PYRITES OR
TUNGSTEN, UNDER THE ACT OF CONGRESS ENTITLED "AN ACT TO PROVIDE
RELIEF IN CASES OF CONTRACTS CONNECTED WITH THE PROSECUTION
OF THE WAR AND FOR OTHER PURPOSES"
APPROVED MARCH 2, 1919.

Manganese, Chrome, Pyrites, and Tungsten.

(No claims for any other minerals can be considered.)

If there is not sufficient space after any question in which to fully answer, extend the same on a separate sheet and attach as a page at the end of this questionnaire, clearly indicating to which question the additional data refers.

1. What is the name of the person, firm or corporation making claim under this Act? Tungsten Reef Mines Co.

2. (a) If a person, give:

(1) Name _____

(2) Age _____

(3) Residence _____

(4) Regular occupation _____

(b) If a firm or corporation, give:

(1) Date and place of organization, or incorporation _____

(2) Names of officers, or co-partners A.J.Clark, President.

L.E.Porter, Secretary

A.J.Clark, Treasurer

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(3) Character of business conducted since the organization.

Tungsten mining

(4) Location of main office 630 H.W.Hellman Bldg., Los Angeles, Calif.

(5) Name and position of officer filing this claim

A.J.Clark, President

(6) Authorized capital \$400,000.00

(7) Stock and bonds-issued 350,000 shares at par value of ^{1.00}\$100.00

(8) Describe the property operated General description ~~Expose~~ gold reef -
near Herford, Arizona (See attached Purchase Contract Exhibit 2.)

(9) Capital actually paid in cash \$168,000.00

3. What experience has the claimant had, and with what results?

(a) In the mining of the particular minerals covered by this claim?

Tungsten 3 years.

(See attached statements Exhibit 1.)

(b) In any other kind of mining? 15 years gold

(See attached exhibits 1).

4. For the production of what mineral did claimant begin mining? _____
Originally gold
5. When did claimant first undertake the mining, or preparation for mining of any of said minerals, and what was done in pursuance thereof? _____
June 1918 purchased property and started development work.
6. Did claimant enter into any written contract with the Interior Department, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation (hereinafter referred to as "Government Agencies"), or with any officer, agent, or employee thereof for the production of Manganese, Chrome, Pyrites, or Tungsten? No
 If so, attach hereto copy of such contract.
(See statement of claim attached)
7. If claimant had any correspondence with any of said Government Agencies, or any officer, agent or employee thereof, relative to the producing or preparing to produce any of the minerals above named, attach copies of all letters and telegrams sent to, and received from any of said Government Agencies, its officers, agents, or employees concerning the same.
Yes see attached Exhibits #8 and 9.
8. Did any of said Government Agencies, or any of the officers, agents or employees thereof, request or demand that claimant produce or prepare to produce any of the above named minerals? Yes If so, state:
 (1) When and where such request or demand was made and by whom?
In the public

 (2) Who were present at the time of the making of the same?

 (3) What was said by each of the parties as to the same?

9. What induced claimant to undertake the production of any of the above mentioned minerals?

Our Country's war necessity was the first
consideration.

10. (a) When did claimant begin to produce or prepare to produce any of the minerals above referred to?

June 1918 to February 1919

- (b) What preparation was made?

Machinery purchased and installed -
Men put to work - Mill erected - Development started.

11. Did claimant agree to supply any foreign government, corporation, partnership or individual with any of the minerals above enumerated? No
If so, give details.

12. What mine or mines did claimant develop for the production of any of said minerals, and where are they situated?

13. If claimant was the purchaser, owner or lessee of the mines described, give a synopsis of the terms of the purchase, lease, contract, option or conveyance, including the dates, consideration and royalties agreed upon.

Purchased outright for \$75,000.00. Paid \$57,500.00 and agreed
to keep a given crew at work continuously. (See Purchase Contract
attached - Exhibit 2.)

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14. If claimant expended any money in the purchase of machinery, equipment or appliances, state:

(1) When Yes

(2) Character of the machinery, equipment and appliances and name and place of business of person from whom purchased?

See attached itemization Exhibit 10. No claim made

on same, however.

Make an itemized statement of the cost of the same, also the cost of transportation thereof to the mine.

Itemized Statement attached. No claim made on same.

15. Give an itemized statement of the date and amount of expenditures and obligations incurred for the development of, and for improvements on the property other than those specified in Question No. 14.

Itemization Exhibit 10 attached, and Synopsis of claim

16. (a) Is claimant still operating the mine, and if so, is it the intention to continue the operation of the same? Yes

Ceased operations May 10, 1919 to May 15, 1919.

- (b) If not now operating does claimant expect to resume operations?

17. If not intending to resume operations, does claimant intend to sell the machinery, equipment, or other appliances so purchased to equip said mine for the purpose of complying with the request or demand of any of said Government Agencies?

No

In such event itemize the reasonable salvage or usable value thereof.

18. Did claimant spend any money in the construction of roads to the mines?

Yes If so, describe briefly the length and character of each, the amount of money so expended thereon, and when construction thereof was begun and completed.

Approximately \$3000.00 on road from foot to top of Mountain.

19. If claimant produced any of said minerals within the following periods, state the quantity, grade and cost of production thereof:

- (a) Prior to April 6, 1917: No

- (b) From April 6, 1917, to November 11, 1928, inclusive:

no

(c) After November 11, 1918.

20. Did claimant make any sales or shipments of any of said minerals? Yes
 If so, give name of purchasers, quantity and grade of said minerals and consideration received therefor during the following periods:

(a) Prior to April 6, 1917.

No

(b) From April 6, 1917, to November 11, 1918, inclusive.

No

(c) After November 11, 1918.

4.2 tons 68.85% scheelite to Atlas Crucible Steel Co.

Dunkirk, N.Y. shipment refused

21. If claimant has any of said minerals on hand, state where the same are, together with the character, grade, market and estimated value thereof, on November 11, 1918, and at the present time.

None

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22. Give an itemized statement of all profits made by claimant in the sale of any of the minerals above mentioned during the period from April 6, 1917, to November 11, 1918, inclusive, and from all other products or related sources during said period.

None

23. Give an itemized statement of losses sustained by claimant in producing and preparing to produce any of the above mentioned minerals, and when the same occurred.

See attached Itemization Exhibit 10 and Summary of Claim

24. Are claimant's transactions recorded in properly kept account books, and, if so, where can they be examined? 630 H.W. Hellman Bldg.,

Los Angeles, Calif.

25. (a) To what extent is claimant's property developed?

20% - in that 18,000 tons of ore are blocked out.

- (b) Can a reasonable estimate be made as to the quantity and quality of the minerals not yet produced? Yes. If so, make such estimate.

\$12.90 per unit as a contract exists for same at that price, which is below production cost.

26. Does the property, the development of which was undertaken by claimant, contain Manganese, Chrome, Pyrites, or Tungsten in sufficient quantities to be of commercial importance? Yes. Does it contain other minerals? Yes. If so, give estimate of quantity, assays thereof, and estimated value per ton of such other minerals.

30,000 tons probable ore in mine

27. (a) What amount and rate of interest did claimant pay on loans used in the production, and preparation for production of any of the above enumerated minerals? 6%

- (b) Are such amounts of interest included in your estimate of losses?

Yes

28. What charges, if any, were made in either money or stock for financing claimant's undertaking? None

29. If such undertaking was by a corporation or company, what salaries of the officers were agreed to be paid?

Manager - \$250.00 per month.

30. If undertaken by an individual, or partnership, state the amount of salary agreed to be given to the:

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(1) Superintendent \$350.00 per month

(2) Engineer Was Superintendent

(3) Other skilled labor \$5.00 per day

(4) Price per day agreed to be paid for ordinary labor: \$4.00 per day

31. Were any dividends paid? None. If so, how many, the amount, and the percentage of each? _____

32. Attach copies of all contracts:

(1) For the financing of the enterprise None

(2) By which moneys were to be raised for the enterprise None

(3) For the sales of the minerals to be produced Exhibit 3.

33. Give name and amount of stock owned by each stockholder owning more than 5% of the stock of the Company. A.J.Clark 97%

34. At the time claimant determined to produce any of said minerals did claimant contemplate presenting a claim against the Government in case losses were incurred? No. If so, what information did claimant give to any of said Governmental agencies, or their officers, agents or employees relative to the same? _____

If by letters, attach copies.

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35. Did claimant consult with any of said Governmental agencies or their officers, agents or employees as to the machinery to be bought, the land to be leased or purchased, or the buildings to be constructed?

Solicitation, however, was contained in Mining Journals

If so, when? and in published speeches of Government agents in the

With whom? Public press.

What was said?

What conclusion was arrived at?

36. Did claimant pay to any employees any damages for personal injuries sustained in the work of producing any of said minerals?

If so, how much? Compensation Insurance included in Costs of
operations.

37. Attach to this Questionnaire an itemized statement of all expenditures and receipts, and all assets now on hand.

(See attached Exhibit 10)

38. The following affidavit must be made out regarding the statements made in answer to the foregoing questions.

=====

State of California } ss:
 County of San Francisco }

A. J. Clark, of lawful
 age, being duly sworn, deposes and says:

THAT he is the President
 (Claimant, or president, or treasurer of Co.)

Tungsten Reef Mines Company
 in the application for relief before the Secretary of the Interior
 for net losses sustained in producing or preparing to produce Tungsten
 under the act of Congress aforesaid, approved March 2, 1919.

THAT he has read each of the questions in the foregoing
 Questionnaire and has read the answers thereto and the statements
 made and attached in reference to the same. That the said answers
 and statements therein and attached are true.

A. J. Clark

Subscribed and sworn to before me this 24th day of May, A.D. 1919.

Mary L. Thomas

31

EXHIBIT B.

San Francisco, Calif.,
May 23, 1919.

From: Tungsten Reef Mines Co., 630 H. W. Hellman Bldg., Los Angeles, Calif.

To: War Minerals Relief Commission, Room 2131 Interior Department Bldg., Washington, D. C.

Subject: Petition for hearing.

1. Because of the extreme Governmental War time necessity for Scheelite production, the undersigned, who with his associate had been the pioneers in the production of Scheelite from the low-grade Tungsten Ores of the West, investigated that property known as the Expose Gold Reef Mine, near Hereford, Arizona, and proceeded on the work of development.

2. Under date of October 1st, 1918, a contract was accepted with the Atlas Crucible Steel Company of Dunkirk, N. Y., for 90 tons of Scheelite Concentrate, based on 60% W O₃, at \$30.00 per unit, deliveries to begin January, 1919.

3. Development work was continued and Mill erected.

4. On the above mentioned contract this firm was acting as sub-contractors to the Atlas Crucible Steel Company, who in turn were sub-contractors to the Rich Tool Company, of Chicago, Illinois, who in turn were sub-contractors to the Wright-Martin Airplane Corporation at that moment working under Government Bureau of Aircraft production orders.

5. On December 23rd, owing to the end of hostilities with Germany, our order from the Atlas Crucible Steel Company was cancelled.

6. Through inability to obtain release from that clause of our contract of mine purchase which required a given number of shifts per month, we had to proceed in production until Feb. 10th, at which time a release from the operation of this clause for 60 days was secured.

7. An analysis of the company's financial situation on Feb. 15th shows permanent investment as follows:

Paid on purchase price of property	\$37,500.00
Construction	9,871.73
Equipment	33,339.40
Livestock	1,292.60

Furniture & Fixtures—Los Angeles.....	152.00
Accounts Receivable	318.67
Material and Supplies	12,680.65
Cash on hand	2,195.88
Mine cash account.....	2,091.96
Operating costs to date.....	34,309.73

8. *No claim is being made covering items of permanent assets, the only elements of charges being the operating costs from May 5, 1918 to Nov. 11, 1918, as follows:*

Operations to October 31st:

Mine Operations	\$6,935.23
Mill Operations	2,729.54
General Mine Expense.....	3,922.02
Boarding House Loss.....	800.84
Los Angeles Office Expense.....	4,692.99

Operations Nov. 1st to Nov. 11th inclusive:

Mine Operations	410.75
Mill Operations	248.44
General Mine Expense.....	319.68
Boarding House Loss.....	106.35
Los Angeles Office Expense.....	349.47

For'd	\$20,515.31
-------------	-------------

33	Brought for'd	\$20,515.31
	Expense to U. S. Army medical doctor for professional services at mine Nov. 2, 1918, during "Flu" epidemic.....	\$1,098.00
	Sales Commission due L. H. Butcher Co. for negotiating contract with Atlas Crucible Steel Co.	3,780.00

making net claim	\$25,393.31
------------------------	-------------

9. *During period of time from May 5th to Nov. 11th no Concentrates were produced. Subsequently, during December 4.2 tons of Scheelite Concentrates to a value of \$2,643.90 were produced and shipped, and acceptance of same refused by the Atlas Crucible Steel Company, leaving on hand at date of suspending operations, namely, Feb. 10, 1919, Scheelite Concentrate, 4.2 tons to a value on that date of \$2,643.90.*

10. In that said material was produce- subsequently to November 11th and no claim for losses sustained after Nov. 11th is made, it is believed that value of said finished product should not be deducted from this claim.

11. Later, on *March* 17, 1919, this company accepted a contract for 90 tons of Scheelite Concentrate from the Atlas Crucible Steel Company of Dunkirk, N. Y., for \$12.90 per unit, and *received an advance on said contract of \$56,000.00, said advance being made in order that this sum could be utilized in making payments due on mine, the shipments being distributed over a very long period as follows:*

Sellers normal monthly output up to 15 tons per month beginning June 1, 1919, with no requirement for a minimum shipment.

12. This contract was taken with the hope that the market might stabilize and advance in such a manner as to ultimately give a profit to those operating this property.

13. The loss of \$25,393.31, we believe to be a definite sum lost while we were endeavoring to help the Government, acting under implied demand of the Government, and actually as sub-contractors to main-contractors working under definite Government orders.

14. We have *not included itemization of equipment and machinery because we claim no loss on such equipment and machinery, in that, it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations.*

15. The above mentioned claim is therefore respectfully submitted in the following figures:

\$25,393.31

with the request that the petitioner be allowed to appear before such representatives of the Commission as may be selected for further presentation of this claim.

16. Attached find substantiating data mentioned in itemized list of Exhibits herewith.

A. J. CLARK.

35 Before the War Minerals Relief Commission.

EXHIBIT C.

Claim No. 938-918.

In the Matter of the Claim of Tungsten Reef Mines
Company.

Hearing at Los Angeles, California, Saturday, June 28,
1919.

All we went into was com. proposition to make us all
money.

One-half stock owned by Porter & Clark.

* * * * *

36 Mr. Porter: January 1st.

Mr. Clark: No, on January 1st. They are specified
payments.

Commissioner Moore: They are obligatory, are they?

Mr. Clark: They are specified payments.

Commissioner Moore: You have \$12,500 payable January
1st.

Mr. Clark: Yes.

Mr. Porter: That was extended 60 days.

Commissioner Moore: *I understand that. You want to
keep it.*

Mr. Carson: *But no element of the purchase price of the
mine enters into this claim.*

Mr. Clark: There was for some time there that the Gov-
ernment was going to take everything over—take over the
Standard. I wish they had. They took out some \$300,-
000 out of the Standard and came out \$20,000 or \$30,000 in
debt. That was not making money very fast.

Chairman Shafroth: No, I should say not.

Mr. Clark: That ore is up there—it is garnet ore, and
it is hard, and we broke two or three crushers right into it.
We tried all kinds of testing out all the time to find out
which was the best way to handle that, to crush the ore.

Commissioner Moore: I think, Mr. Chairman, that is all
I desire to ask.

* * * * *

37 proposition, and they claimed they had to have tungsten, and according to those letters they kept asking us to increase our production, to take other new properties, and all that kind of thing; then we pulled the 65-ton mill out and put a 150-ton mill, which we have got up there now.

Mr. Carson: *Would it be allowable for me to clearly state for the record what the Tungsten Reef claim consists of, and the Standard claim consists of?*

Chairman Shafroth: *I think you better do so.*

Mr. Carson: *In the Tungsten Reef mines the claim is only for the overhead and actual expense of making test runs from the time of starting to November 11, 1918.*

Commissioner Moore: *You accept this statement as your version of it, Mr. Clark?*

Mr. Clark: *Yes, sir.*

38 **E. L. Carton** was thereupon called as a witness, and having been first duly sworn by the notary public, was examined and testified as follows:

Commissioner Moore: Please repeat that.

Mr. Carson: *The Tungsten Reef claim is only for the elements of overhead and testing to determine upon the proper equipment to purchase, during the period up to November 11, 1918. The items of permanent investment are not claimed at all, because Mr. Clark had determined to keep the property and eventually run it, and did not look on it as a fair proposition to claim any depreciation, or anything of that kind; so the claim comes to \$21,600 and some odd dollars, that was expended in making these tests, and various operations in the mine, that would lead up to the permanent investment. Now, on the Standard tungsten, the claim is—there was \$302,000 that the product produced over the whole productive period.*

Chairman Shafroth: In the Standard?

Mr. Carson: In the Standard. The permanent investment was \$160,000, approximately. Approximately 95 per cent of production was between April 6, 1917, and November 11, 1918. There was therefore claimed the privilege of amortizing the permanent investment over product produced. That would be charged as an

* * * * *

EXHIBIT D.

Commissioners: John F. Shafroth, Philip N. Moore,
Horace G. Pomeroy.

Department of the Interior.

War Minerals Relief Commission,

Washington.

February 8, 1921.

Claim No. 938.

In the matter of the claim of the Tungsten Reef Mines
Company, Los Angeles, Calif. Tungsten.

The Honorable, the Secretary of the Interior.

DEAR SIR:

This is a claim for losses alleged to have been sustained in preparing to produce tungsten ore from certain mines near Hereford, Cochise County, Arizona.

Request to produce tungsten ore was made to individuals who organized the operation of the claimant company, by E. S. Larsen, of the U. S. Geological Survey, on July 9, 1917, at the mines of the Standard Tungsten Mines Company. Request to produce tungsten ore was made in a letter of March 30, 1918, from Mr. Hugh W. Sanford, of the War Industries Board, addressed to the Standard Tungsten Mines Company, and also by E. S. Larsen, of the U. S. Geological Survey, on June 4, 1918, at the mines of the Tungsten Reef Mines Company. Mr. L. E. Porter, Secretary, and A. J. Clark, President, representing both the Standard Tungsten Mines Company and afterwards the Tungsten Reef Mines Company, were recipients of the Government request to produce tungsten ore.

40 In May 1918, Mr. A. J. Clark, L. E. Porter, and W. S. Fraser, as individuals, incurred the obligation to purchase the property which forms the basis of this claim. The claimant herein, the Tungsten Reef Mines Company, was formed to finance and operate the properties, and conveyance of the mines was made to claimant. A. J. Clark acquired 179,625 shares of the stock of the said com-

pany, out of 400,000 shares of the total authorized. From May 5 until November 11, 1918, preparations were made to mine the ore, and an old mill was constructed to adapt it to the concentration of tungsten ore. Only a small amount of concentrates was produced before November 12, 1918. This was later sold and the receipts therefrom were credited to this claim as ore sales. *No claim is made herein for property purchased or permanent improvements.* The only elements charged are the operating costs from May 5, 1918, to November 11, 1918.

The auditor for this Commission has set forth the following items as constituting the claim.

June 1918 to Nov. 11, 1918.

Mine labor and supplies Sched. 1.....		\$7,259.22
Mill labor and supplies Sched. 1.....		2,978.66
General Mine Expense Sched. 1.....		4,285.51
Los Angeles Office (including salaries of management) Sched. 2....		5,043.12
Boarding House Expense.....	\$3,013.54	
Less deductions from payrolls.....	2,102.68	
		910.86
Flu Epidemic Expense:		
Dr. W. J. Froitzheim, U. S. A.		
3 trips to mine @ \$100.....	300.00	
15 trips to mountain 50.....	750.00	
Serum treatment.....	48.00	
		1,098.00
Total operating costs.....		21,575.37
Less rentals received.....		158.01
		\$21,417.36
Net operating cost for which claim is made.....		
41		
The auditor for this Commission sets forth the total expenditures as.....		\$21,417.36
The Commission disallows certain items and makes further deductions:		
From flu expenditures.....	\$525.00	
Management salary of A. J. Clark.....	1,341.67	
Legal Expense.....	205.00	
Incorporating expense.....	1,140.31	
Sales of ore produced before Nov. 12, 1918...	2,758.77	
		5,970.75
Net Loss.....		\$15,446.61

The item for management, salary of A. J. Clark, for \$1,341.67 included in Los Angeles office expense item, is deducted from the claim for the reason that it is not chargeable under the War Minerals Relief Act. The manager, A. J. Clark, lived in Los Angeles but visited the property from time to time and all travelling expenses are allowed: the superintendent, L. E. Porter, was continuously at the

mine and his salary is allowed. Mr. Clark was the owner of 179,000 shares of the stock of the company.

The Commission has uniformly held that where men work for themselves and are entitled to the profits of the enterprise that they do not charge themselves with salaries. The loss of any salary above the cost of subsistence is usually regarded as a failure to receive a profit and not such a loss as is contemplated by the Statute under which the claim is filed.

The Act expressly provides:

“That no profits of any kind shall be included in the allowance of any of said claims.”

42 The men, however, who work for themselves in a business, generally take out of their business, funds upon which to subsist and charge them as a necessary expense of the business.

The Commission has, however, established a rule for its guidance, that where a claimant working for himself furnishes his own supplies, \$4.00 per day is a reasonable amount to allow for subsistence, but that where the supplies are furnished he is given \$3.00 per diem for subsistence. Here such allowance was made for the manager's (A. J. Clark) subsistence at \$4.00, in the claim of the Standard Tungsten Mines Co., No. 918.

The Commission therefore recommends that an award in this case of \$15,446.61 be made.

JOHN F. SHAFROTH,
PHILIP N. MOORE,
HORACE G. POMEROY,
Commissioners.

DEPARTMENT OF THE INTERIOR
WASHINGTON

FEB 10 1921

In re *Exhibit E*

WJ
2/9/21

Tungsten Reef Mines Company : Claim No. 938.

The above is a claim under the War Minerals Relief Act, section 5 of the act of March 2, 1919 (40 Stat., 1274). The law authorizes compensation for losses incurred in the production of tungsten during the war due to stimulation by the Government.

Here there was such stimulation. I have considered the record and an award of \$15,446.61 is made as recommended by the War Minerals Relief Commission.

SEAL PAID

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DEPARTMENT OF THE INTERIOR

QUESTIONNAIRE

Exhibit F PROPERTY -- INTEREST

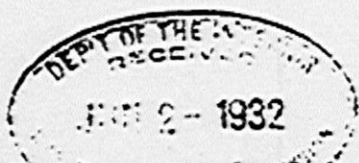
QUESTIONS TO BE ANSWERED BY THOSE CLAIMING RELIEF FOR LOSSES SUSTAINED IN THE PURCHASE OF REAL ESTATE OR MINING RIGHTS AND IN THE PAYMENT OF INTEREST ON BORROWED CAPITAL UNDER THE ACT OF CONGRESS ENTITLED "AN ACT TO PROVIDE RELIEF IN CASES OF CONTRACTS CONNECTED WITH THE PROSECUTION OF THE WAR AND FOR OTHER PURPOSES" APPROVED MARCH 2, 1919, AS AMENDED

NOTICE TO CLAIMANTS AND THEIR ATTORNEYS:

Return this questionnaire, when sworn to, together with two copies of same, to the War Minerals Relief Commission, Interior Department Building, Washington, D. C.

If there is not sufficient space after any question in which to answer fully, extend the same on a separate sheet and attach as a page at the end of this questionnaire, clearly indicating to which question the additional data refers.

Consideration and adjustment of claims will be expedited if claimants will file with the War Minerals Relief Commission without delay such documents, statements, papers, affidavits, etc. as may be necessary to support the items of alleged loss.



PROPERTY

1. Give the name and the present post office address of the person, firm, or corporation making claim for losses. Tungsten Reef Lines Company,
4206 South Budlong Ave., Los Angeles, California.
2. Give the location of the property. near Hereford, Cochise County, Arizona
3. Give the number under which the claim has been considered by the War Minerals Relief Commission in the past, in order that it may more certainly be identified. No 938

59134

4. What is the amount you claim as loss in the purchase of property or mining rights? \$ 114,474.92
5. When and from whom was the real estate or mining rights purchased? May 7, 1918. R A Dill and Daisy Dill, Bisbee, Cochise County, Arizona.
6. What was the purchase price paid or contracted to be paid? Purchase Agreement \$ 75,000.00; amount paid in full \$ 62,500.00
7. Give amount of first and all subsequent payments, with date of each. May 8, 1918 \$ 12,000; May 27, 1918 \$ 13,000; June 11, 1918 \$ 210.royalty;
June 27, 1918, \$ 522.70 royalty; December 28, 1918 \$ 11767.30; July 14
1919, \$ 25,000.00.
8. Were the payments made in cash, or did stocks or other considerations figure in the purchase price? If payments were other than cash, explain fully. Cash paid
9. Do you still own the real estate or mining rights? yes
10. State whether or not a mine is being operated or has been operated on the real estate since the war, and if so, by whom. mine has not been operated-
suspension notice effected February 10, 1919.
11. If you still own the real estate or mining rights, estimate the present value, including timber, water rights, and all other things of value connected therewith, and also the value as of March 2, 1919. The present value is estimated at \$ 6,679.00; as of March 2, 1919 the
value of \$ 9,200.00 is estimated, the real estate on that date was of
little or questionable value.

12. If the real estate or mining rights have been disposed of, state amount received (cash or other considerations) giving details as to date of sale, name and address of purchaser, etc. property held by Claimant the

Tungsten Reef Mines Company

13. If the real estate or mining rights reverted to the seller, state the conditions under which repossession was gained, giving the date of the transaction.

Property held by Claimant the Tungsten Reef Mines Company

14. State whether or not you are under legal obligations in the matter of the real estate or mining rights at the present time, and if so, why, and to what extent. No

15. Is this claim you now make in any manner or to any extent a revival of an indebtedness, or of an obligation which was discharged by compromise, barter, trade, or by operation of the law? In other words, has the debt or obligation existed in whole as a legal debt or obligation continuously since the war?

The claim now made is not a revival of a compromised or discharged obligation.

16. Did you make any profit in the purchase and sale, or in the sale or trade, of any real estate containing manganese, chrome, pyrites, or tungsten, or in the mining rights to such real estate from the time you received authorized Government request to produce any of these minerals to the date of the Armistice? If so, state the amount of such profit, giving details in full. No

17. Was the purchase of the real estate or mining rights described in this claim the necessary first step by you in carrying out the request of an authorized Government agency to produce? Yes

18. Was the purchase in any degree speculative, or for the purpose of saving royalties under an existing agreement? No

19. Did you have an option on the real estate or mining rights prior to the date when you received an authorized Government request to produce? No

20. Did the individual, company, or corporation from which purchase of real estate or mining rights was made take a financial interest in the subsequent operations? If so, give full details as to such interest. No

21. Have you received in any former award under the War Minerals Relief Act an allowance for royalties which amount, under the terms of a contract to purchase, was applied on the purchase price? No

22. In your operations, did you charge to your business anything for depreciation? No

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from the original bound volume

INTEREST

23. What is the amount of your claim for interest actually paid? None
24. What is the amount of your claim for interest still to be paid? None
25. Was the capital on which interest was paid, or is still to be paid, if any, used solely and wholly in your attempt to comply with the request of an authorized Government agency to produce either manganese, chrome, pyrites, or tungsten, and not otherwise? _____
26. Give dates and amounts of capital so borrowed, the rate of interest, the name and address of the lender, and dates and amounts of interest actually paid, and amount of interest still to be paid, if any. _____

27. Has there been at any time a compromise settlement with your creditors? If so, give details. _____

28. Is the presentation of your claim for interest at this time a revival to any extent of an obligation which was discharged by compromise, barter, trade, or operation of the law? In other words, is this a legal obligation that has continued from the days of the war? _____

29. Was the interest so paid and is the interest still to be paid, if any, computed as simple or compounded interest? _____
30. What is the legal and what the lawful rate of interest in the state where the money was borrowed? _____
31. Did the lender of the money to whom interest was paid or still is to be paid, if any, have a financial interest in your mining operations either as a partner, owner of stock, or otherwise? _____
32. If a corporation, did any of your stockholders at any time lend money to the corporation? _____
33. If a partnership, did either partner at any time lend money to the other partner? _____
34. Name the authorized Government agency at whose instance the money was borrowed. _____

Note: The statements of claimant as to money borrowed and used in response to Government request to produce, and as to interest paid, and still to be paid thereon, should be supported by the sworn statement of the person making such loans and receiving such interest payments, giving details as to amounts, dates, rate of interest, and all other material facts of the transaction.

The following affidavit must be made in relation to the answers to the foregoing questions.

State of California
County of Los Angeles

SS:

George King of lawful age
being duly sworn, deposes and says:

That he is the

Secretary
(Claimant, or president, or treasurer of company)

Trungsten Reef Mines Co.
in the application for relief before the Secretary of the Interior for net losses sustained in producing, or preparing to produce Trungsten under the Act of Congress aforesaid, approved March 2, 1919, as amended;

That he has read each of the questions in the foregoing Questionnaire and has read the answers thereto and the statements made and attached in reference to the same. That the said answers and statements therein and attached are true.

George King
Subscribed and sworn to before me this

28 day of May, A. D., 1932

M M Jenks

51

EXHIBIT G.

United States Department of the Interior,
Office of the Secretary,
Washington.

Jun. 9, 1932.

*Reconsidered under Decree of the Supreme Court of the
District of Columbia.*

In re Tungsten Reef Mines. Co.

Claim No. 938—War Minerals Relief Act.

February 10, 1921, an award of \$15,446.61 was made in this claim. The claimant company now presents a claim for \$114,474.92 loss on property.

The claim may be held to be a distinguished claim in this respect: Loss on property was specifically disclaimed in the original questionnaire and the disclaimer was repeated in the hearings which came later. As a result of this voluntary action by the claimant the expenditure for property did not become a part of the claim and was not set up and did not appear in the figures upon which the award was based. In claiming it now, the claimant is, in fact, presenting a new claim.

In the petition for a hearing, dated May 23, 1919, signed by A. J. Clark, the following statement is made:

“No claim is being made covering items of permanent assets, the only element of charges being the operating costs from May 5, 1918, to November 11, 1918” etc.

In another paragraph it is stated:

52 “We have not included itemization of equipment and machinery because we claim no loss on such equipment and machinery in that it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations.”

At the hearing on the claim in June, 1919, Mr. Carson told the Commission that “no element of the purchase price

of this mine enters into this claim," to which Commissioner Moore replied, "I understand that; you want to keep it." A statement of a similar character was made by Mr. Carson later in the hearing, at which point Commissioner Moore turned to Mr. Clark and asked whether he accepted this version of the claim and Mr. Clark replied that he did. Mr. Clark was the president of the company.

It is a part of the record that in October, 1918, the claimant made a contract with the Atlas Crucible Steel Company for 90 tons of 60 per cent or over tungsten concentrates at \$30.00 per unit, deliveries to begin in January, 1919. The contract contained no cancellation clause and was unusually favorable to the claimant in other respects. Particularly and all-important, it was not to be affected by the termination of the war; and it is a fair conclusion that possession of this contract is the reason why purchase price of property not only was not claimed under the War Minerals Act but was specifically and repeatedly disclaimed. In connection with the contract, it may be stated that the Atlas Crucible Company finally gave notice that it would not accept tungsten under the contract. Claimant insisted that the contract could not be ignored in that manner and proceeded

53 to ship a few tons of the concentrates, at the same time giving the company to understand that refusal to accept would be grounds for a suit in the courts for violation of contract. As a result, a second contract was made, on March 17, 1919, to take the place of the first contract, by the terms of which the Atlas Company agreed to take 90 tons of concentrates at \$12.90 per unit. Claimant says in his petition of May 23, 1919, that \$56,000.00 was received as an advance payment under this contract, "said advance being made in order that the sum could be utilized in making payments due on mine." It may well be supposed from the record that the claimant, the Atlas Company and the owner of the property had an understanding by which a claim was to be filed with the War Department under the Dent Act for losses suffered by reason of the Bureau of Aircraft's cancellation of its contract to take the concentrates from the Atlas Crucible Company, which, in turn, refused to take the concentrates from the claimant company.

It is not necessary to present all the facts and circumstances which support the conclusion that a combined effort

was made to collect from the War Department. The attempt was made, it failed, and now claimant is attempting to get compensation under the War Minerals Act.

With the record showing conclusively that the purchase price of the property never was a part of the claim, being positively disclaimed, and considering the transaction by which the claimant received \$56,000.00 to apply on property purchase, the inclusion in the late questionnaire of
54 an alleged property loss can not be accepted as bringing the claim for property within the act and the claim is denied.

The court decree covers interest, but no interest is claimed.

No award is made.

RAY LYMAN WILBUR,
Secretary.

55

EXHIBIT H.

United States Department of the Interior,
Office of the Secretary,
Washington.

Dec. 16, 1932.

In re Tungsten Reef Mines Co.

Claim No. 938. War Minerals Relief Act.

Decision of June 9, 1932, Adhered to.

Rehearing Denied.

In a decision dated June 9, 1932, the Secretary of the Interior denied this claim for purchase of property, some of the reasons for rejection being stated as follows:

Loss on property was specifically disclaimed in the original questionnaire and the disclaimer was repeated in the hearings which came later. As a result of this voluntary action by the claimant the expenditures for property did not become a part of the claim and was not set up and did not appear in the figures upon which the award (award for operating loss) was based. In claiming it now the claimant is, in fact, presenting a new claim. * * * With the

record showing conclusively that the purchase price of the property never was a part of the claim, being positively disclaimed, and considering the transaction by which the claimant received \$56,000.00 to apply on property purchase, the inclusion in the late questionnaire of an alleged property loss can not be accepted as bringing the claim within the act and the claim is denied.

In the brief accompanying the application for rehearing, the claimant admits that he did not at the time of filing the original claim on May 31, 1919, request compensation for property loss, but that he did show the facts in respect to the amount which he had paid or agreed to pay for
56 the property; that these facts were disclosed within the statutory period and the Government put upon notice; that to refuse compensation for property loss on the pretext that no claim was filed is contrary to the law and in violation of the order of the court.

The claim has had careful reexamination in the light of claimant's brief, with the result that his contentions are found to be without merit. The history of this claim as set forth in the Secretary's decision is a correct statement of facts. When the claim was filed the claimant positively disclaimed such items in the list of expenditures as pertained to permanent assets; at the hearing which took place before the claim was taken up by the Commission for definite disposition, it was plainly stated that no element of the purchase price of the property entered into the claim because Mr. Clark had determined to keep the property and they did not look upon it as a fair proposition to even claim depreciation or anything of that kind. No intimation of a purpose to claim property loss appears in the record from the time of filing the claim in 1919 to the filing of the late questionnaire in 1932. In now claiming that the facts of expenditure for property were disclosed within the statutory period, claimant must be referring to his suit filed under the act of February 13, 1929. But that act only
57 authorizes a review of the decisions of the Secretary on questions of law. It does not grant the right to file new claims. It is under the decree of the court in the said suit that this claim was examined and denied.

In consequence of claimant's disclaimer of intent to claim loss on property, and his adherence to that purpose

throughout the long investigation and adjustment of the claim as to loss on operations, and because the loss on property was not a part of the claimed loss until 1932, the Secretary is without legal authority to make an additional award as requested in the application for rehearing. The War Minerals Act of March 2, 1919, precludes the allowance of any claim presented after the expiration of 90 days from the passage of the act. This claim, as to purchase of property, falls within that prohibition and application for rehearing must be denied.

RAY LYMAN WILBUR,
Secretary.

58 *Motion to Strike Respondent's Motion to Vacate
Order for Writ of Mandamus, &c.*

Filed April 29, 1935.

* * * * *

Comes the petitioner by his attorney, Josephus C. Trimble, and moves the Court to strike the motion of the Respondent to vacate the judgment entered herein; and for reasons thereof, says:

1. That the judgment is a valid and subsisting judgment and not open to attack by Respondent's motion.
2. That the alleged question of jurisdiction raised by the Respondent's motion is res judicata.
3. That the judgment is valid on its face and Respondent's motion does not show otherwise.
4. That respondent's motion does not show a valid defense to the original petition.
5. That the motion of Respondent was not timely brought.

Respectfully submitted,

MATHEWS & TRIMBLE,
By JOSEPHUS C. TRIMBLE.

Service of the above accepted and copy received together with points and authorities in support, this 27th day of April, 1935.

WILLIAM H. ABBOTT.

Memorandum Opinion.

Filed June 25, 1935.

* * * * *

The jurisdiction of this Court over War Mineral Relief Claims is prescribed by the Act of February 13, 1929, (45 Stat. 1166) which limits the court's jurisdiction to one of review over final decisions of the Secretary of the Interior on questions of law in cases filed by claimants in the manner prescribed by existing law.

On January 15, 1932, this Court made an order consented to by the parties involved, that a writ of mandamus issue to the Secretary of the Interior directing him to proceed to ascertain whether the relator had incurred a net loss by reason of expenditures made in the purchase of property theretofore employed in the production of tungsten in compliance with the request of the Department of Interior, and to proceed with the final adjustment of the relator's claims in compliance with the Act of Congress of March 2, 1919.

However, the writ has never issued.

While in the petition filed February 7, 1930, for review of the decision of the Secretary of Interior and for mandamus, it is alleged that the Secretary of Interior denied relator an award for items of loss by the purchase of property and cost of mill equipment on the pretext that no claim was made for such expenditures and that the same was denied for the sole reason that the Secretary of Interior held as a matter of law that such losses were not included in the provisions of the Act of March 2, 1919, it is clear from the report and recommendation of the War Minerals Relief Commission and the decision of the Secretary of the

Interior attached to the petition by the relator, that
60 there was not a final decision of the Secretary upon a question of law with regard to an alleged item of loss incurred by claimant in the purchase of property, and only by virtue of such a decision could this Court have had jurisdiction to enter the order for mandamus. Notwithstanding the order was made upon consent, the Court was without jurisdiction in the matter, and therefore the said order was null and void.

The rule on the Secretary of the Interior to show cause why he should not obey the order of the Court of January

15, 1932, is discharged, and the petition for said rule is hereby dismissed; the motion to strike the motion to vacate the order for the writ of mandamus is denied; the motion to vacate the order for the writ of mandamus entered January 15, 1932, is granted and said order is vacated and set aside.

PEYTON GORDON,
Justice.

Supreme Court of the District of Columbia.

Tuesday, June 25, 1935.

Session resumed pursuant to adjournment, Hon. Peyton Gordon, Justice, presiding.

* * * * *

This cause coming on to be further heard upon respondent's motion to vacate, on jurisdictional grounds, the order for writ of mandamus entered herein on January 15, 1932, upon petitioner's motion to strike the motion to vacate said order, and upon a rule to show cause why the order for a writ of mandamus has not been complied with; and the parties hereto having appeared in open court by their respective attorneys and the arguments of said attorneys having been heard, the matters having been submitted and taken under advisement by the court, and the same having been carefully considered, the court being fully advised in the premises; it is hereby ordered, adjudged and decreed this 25th day of June, 1935:

1. That the rule to show cause be and the same hereby is discharged and the petition for said rule be and the same hereby is dismissed.

2. That the motion to strike the motion to vacate the order for a writ of mandamus be and the same hereby is denied.

3. That the motion to vacate the order for a writ of mandamus entered on January 15, 1932, be and the same hereby is granted.

4. That the order for a writ of mandamus entered on January 15, 1932, be and the same hereby is vacated, set aside and held for naught.

From the foregoing order the petitioner by its attorneys of record, in open Court, notes an appeal to the United States Court of Appeals for the District of Columbia; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

July 9, 1935.—Undertaking on appeal approved and filed.

62

Assignment of Errors.

Filed July 23, 1935.

* * * * *

The Court erred:

1. In overruling Petitioner's Motion to Strike Respondent's Motion to Vacate Order for Writ of Mandamus;
2. In entering an order overruling Petitioner's Motion to Strike Respondent's Motion to Vacate Order for Writ of Mandamus;
3. In granting the Respondent's Motion to Vacate Order for Writ of Mandamus; and
4. In entering an order vacating the Order for Writ of Mandamus.

JERRY A. MATHEWS,
JOSEPHUS C. TRIMBLE,
HARRY J. DALY,
Attorneys for the Petitioner.

Service of the above acknowledged this 22nd day of July, 1935.

WILLIAM H. ABBOTT,
Attorney for Respondent.

Designation of Record.

Filed July 23, 1935.

* * * * *

The clerk will please prepare the record on appeal in the above-entitled case and include therein the following papers and proceedings:

- 63 1. Petition for Review of the Decision of the Secretary of the Interior and for Mandamus;
 2. Respondent's Answer to the Petition;
 3. Order for Writ of Mandamus;
 4. Motion to Vacate Order for Writ of Mandamus and to Stay the Issuance of Said Writ;
 5. Motion to Strike Respondent's Motion to Vacate Order for Writ of Mandamus and to Stay the Issuance of Said Writ;
 6. Order granting Motion to Vacate Order for Writ of Mandamus and overruling Motion to Strike Respondent's Motion;
 7. Undertaking on appeal approved and filed July 9, 1935.
 8. Assignment of Errors;

Together with a copy of this Designation.

JERRY A. MATHEWS,
JOSEPHUS C. TRIMBLE,
HARRY J. DALY,
Attorneys for the Petitioner.

Service of the above acknowledged this 22nd day of July, 1935.

WILLIAM H. ABBOTT,
Attorney for Respondent.

Assistant Solicitor, Department of the Interior.

Filed July 24, 1935.

* * * * *

The Clerk will please include in the transcript of record in the above-entitled cause, in addition to the papers designated by petitioner, the following parts of the record:

- 64 1. The order of June 1, 1933, substituting Harold L. Ickes, Secretary of the Interior, as respondent.
 2. The affidavit of Harold L. Ickes, Secretary of the Interior, and the exhibits certified from the records of the War Minerals Relief Commission attached thereto filed on April 24, 1935, in support of the motion to vacate the order for a writ of mandamus.

3. The memorandum opinion of Mr. Justice Gordon dated June 25, 1935.

4. This additional designation of the record.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior.

WILLIAM H. ABBOTT,
Assistant Solicitor, Department of the Interior.

Service of the above acknowledged this 24th day of July, 1935.

J. C. TRIMBLE,
Per H. J. D.,
Attorney for Petitioner.

65 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 64, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 77687 at Law, wherein The United States of America ex rel. Tungsten Reef Mines Company, a corporation, is Petitioner and Ray Lyman Wilbur, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of September, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6554. The U. S. ex rel. Tungsten Reef Mines Co., a Corp., Appellant, vs. Harold L. Ickes, Secretary of the Interior. United States Court of Appeals for the District of Columbia. Filed Sep. 17, 1935. Henry W. Hodges, Clerk.

FILED JAN 3 - 1936

Chas. H. H. H. H.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

—
No. 6554.

SPECIAL CALENDAR.

—

THE UNITED STATES OF AMERICA EX REL. TUNGSTEN REEF
MINES COMPANY, a corporation, *Appellant*,

v.

HAROLD L. ICKES, Secretary of the Interior.

—

APPELLANT'S BRIEF.

—

JERRY A. MATHEWS,
JOSEPHUS C. TRIMBLE,
HARRY J. DALY,
Attorneys for Appellant.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. 6554.

SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA EX REL. TUNGSTEN REEF
MINES COMPANY, a corporation, *Appellant*,

v.

HAROLD L. ICKES, Secretary of the Interior.

APPELLANT'S BRIEF.

This is an appeal from an order of the Supreme Court of the District of Columbia vacating a final consent judgment which had been entered by the Court more than three years prior to the order vacating the same.

Statement of the Case.

This case involves a claim by the appellant, Tungsten Reef Mines Company, for losses sustained in producing tungsten in compliance with an authorized request to

supply the urgent needs of the Nation in the prosecution of the World War. (R. 2)

The appellant timely filed a claim for losses under the provisions of the War Minerals Relief Act, approved March 2, 1919, 40 Stat. 1272, with the Secretary of the Interior, on forms provided by the Interior Department. (R. 17). Appellant's claim set forth the facts showing that it had made expenditures and incurred obligations in good faith for the purchase of property containing tungsten in compliance with said request to furnish tungsten (R. 20, Q. 13). At the time the original claim was filed the Secretary was holding that losses for expenditures for purchase of property could not be allowed and the Department continued to deny such losses until the Supreme Court of the United States affirmed the decision of this Court, 60 App. D. C. 60, in the case of *Wilbur v. Vindicator Consolidated Gold Mining Co.*, 284 U. S. 231, in the latter part of 1931. In the original claim, therefore, appellant showed the items of expenditure but did not then press for payment of its property losses.

On February 13, 1929, an Act was approved, 45 Stat. 1116, which provided:

“That any claimant who has heretofore filed . . . a claim . . . may within one year from the date of the passage and approval hereof petition the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior on any question of law which has arisen or which may hereafter arise in the adjustment, liquidation, and payment of his claim under said Acts”

Section 3 of said Act of February 13, 1929, also provides:

“Jurisdiction is hereby conferred upon the Supreme Court of the District of Columbia, as a district court of the United States, to hear and determine all such suits and enter all orders, judgments, and decrees therein, subject to the usual right of appeal”

Under the provisions of said Act appellant timely filed its petition in the court below and sought an order from the court requiring the Secretary of the Interior to consider the losses sustained due to purchase of property. (R. 2)

The Secretary filed an answer to said petition in which he admitted that appellant “timely filed its claim under the provisions of the Act of March 2, 1919 (40 Stat. 1272) for reimbursement of alleged net losses amounting to \$25,383.31 * * *” but denied that the claim included expenditures for purchase of property (R. 7).

After the United States Supreme Court had affirmed the decision of this Court in the case of *Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co.*, 284 U. S. 231, O. H. Graves, Assistant Solicitor for the Interior Department, agreed with attorneys for appellant upon a consent judgment which was entered by the court below on January 15, 1932, and which judgment directed the Secretary to consider the losses which appellant had sustained due to expenditures for purchase of property (R. 10).

An April 24, 1935, the appellee, the Secretary of the Interior, filed a motion to vacate said judgment of January 15, 1932, upon the ground that the Court had no jurisdiction to enter the judgment because appellant had not expressly claimed losses, sustained due to expenditures for purchase of property in the original

claim (R. 11). And on June 25, 1935, or more than three years after said judgment was entered, the court below entered an order vacating its judgment aforesaid (R. 51).

Questions Presented.

Does a court, having jurisdiction of the general subject matter in controversy and of the parties, when a consent judgment was entered, have the power to vacate said judgment nearly three and one-half years after the entry of said consent judgment.

Argument.

The Rules of the Supreme Court of the District of Columbia provide as follows:

“TERMS OF COURT.”

1. The terms of the general term and of each division of the court, including the Probate Court, shall begin on the first Tuesday in January, April, July and October.

Provided, That whenever the first day of any term shall fall on a legal holiday, such term shall begin on the next following business day, and provided further that, with reference to the control of said courts over their respective orders, judgments or decrees, shall be treated as having expired on the thirtieth day following the entry thereof; but the Court, in cases of emergency, and within the period just named, may extend the term of court and of the several divisions thereof.

2. Continuation of.—Each term shall continue until the Commencement of the next term, and, as to any particular cause, until the final disposition of any mo-

tion, petition, statement of evidence, or bill of exceptions contemplated by and filed or submitted within the time allowed by these rules.”

A Judgment Cannot Be Vacated After the Expiration of the Term of the Court at Which it Was Entered.

The law is well settled in this District that no court can reverse, annul or vacate its own final judgments or decrees for errors of fact or law after the term in which they were rendered, unless for clerical mistakes or to reinstate a cause dismissed by mistake or where said judgment was obtained by fraud.

This Court recently passed upon this question in the case of *Taliaferro v. Carter*, 63 App. D. C. 304, and in the case of *Fidelity and Deposit Co. of Maryland v. Hurley*, 63 App. D. C. 377.

In the *Taliaferro* case, *supra*, the Court reaffirmed the rule stated by Mr. Chief Justice Shepard in the case of *Polk v. Smolik*, 44 App. D. C. 55, that

“no principle is better settled, or of more universal application, that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistakes or to reinstate a cause dismissed by mistake.”

“This rule remains unchanged in the District of Columbia,—unless where clearly shown the judgment was obtained by fraud, or to correct clerical errors. * * *”

This court reversed the decision of the Municipal Court in vacating the judgment after the close of the term.

A Consent Judgment Entered by the Court Which Has Jurisdiction of the General Subject Matter and of the Parties, Cannot Be Set Aside Upon a Motion to Vacate.

The judgment in the instant case was, however, a consent judgment and cannot be vacated unless the court which entered the judgment had no jurisdiction.

We expect to show that the appellant is legally and equitably entitled to the relief sought.

In the case of *Swift v. United States*, 276 U. S. 311, 326, the Court had under consideration a motion to vacate a consent decree. One of the grounds urged was that no case or controversy existed within the meaning of the constitution, and on this point the court said:

“Moreover, the objection is one which is not open on a motion to vacate. The court had jurisdiction both of the *general subject matter*—enforcement of the Anti-Trust Act—and of the *parties*.”

In the instant case the court had general jurisdiction of passing upon the legal questions arising in the “adjustment, liquidation and payment” of losses sustained by claimants under the Act of March 2, 1919 and its amendments.

If the court had Jurisdiction of the “general subject matter” we contend that the parties could consent to the special facts necessary to bring the particular case within the class. In the *Swift* case at page 330, the court dealt with the objection raised by the motion to vacate the consent decree on the ground that said decree enjoined intrastate as well as interstate acts. The packers contended that their consent could

not be validly given to the court to confer jurisdiction to prohibit intrastate acts as the Anti-Trust Act did not forbid intrastate business, and that "the prohibition of intrastate transactions was an overstepping of federal powers which renders the decree a nullity". On this point the court said:

"Again, the argument fails to distinguish an *error* in decision from the *want* of *power* to decide. The allegations of a conspiracy to obstruct interstate commerce brought the case within the jurisdiction of the court."

The appellant here filed a claim under the original Act. The Secretary made a decision on that claim. After the enactment of the 1929 amendment, appellant brought its suit in the court. These facts gave the court jurisdiction to hear and determine the law of the case.

The Supreme Court in its opinion in the *Swift* case, at page 331, continued:

"If the court, in addition to enjoining acts that were admittedly interstate, enjoined some that were wholly intrastate and in no way related to the conspiracy to obstruct interstate commerce, it erred; and had the defendant not waived such error by consent, they might have had it corrected on appeal. But the error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much."

The solicitor for the Department certainly had the power to agree to a judgment to require the Secretary to review errors, if any, in the final decision rendered on February 10, 1921, (R. 37) as admittedly a claim was filed and acted upon by the department.

In the case of *Richardson v. Ruddy*, 15 Idaho 488: 98 Pac. 842, the Court said:

“Jurisdiction over the subject matter is the right of the Court to exercise judicial power over that class of cases not the particular case before it, but rather the abstract power to try a case of that kind or character of the one pending, and not whether the particular case is one that presents the cause of action, or under the particular facts is triable before the court of some inherent facts which exist and may be developed during the trial.

“Whether the particular facts of this case authorized the trial court to enter a decree for partition of the property in question does not involve the jurisdiction of the court to act in the matter, but relates solely to the inquiry: Did the Court act erroneously upon the facts presented? At most, the appellant’s contention goes only to the inquiry, did the court act rightly upon the facts presented, did the court commit an error by the action taken, and not did the court have jurisdiction or power to act at all. It will thus be seen that there is a clear distinction between the jurisdiction of the court to try and determine a matter and the action of such court in a matter which is merely erroneous. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the court did act.”

The court held that the error complained of was not jurisdictional.

The Court below in vacating his judgment entered nearly three and one-half years before, seems to have confused jurisdictional facts with facts necessary to make a good cause of action. His order vacating the judgment, based upon the memorandum opinion,

was that there was no final decision of the secretary on property losses. He admits, however, that "the action was made upon consent" but held it to be null and void.

In the case of First National Bank, 152 Fed. 64, 68, the Court said:

"Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief. * * *"

"The facts which conditioned the jurisdiction of the court were the filing of the petition and the service of the subpoena."

"The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its views of the law and the evidence, and its wrong decisions are as conclusive as its right ones."

In the instance case, appellant filed a claim under the original Act. The Secretary made an award on that claim. After the 1929 amendment to the Act was approved, appellant brought suit. It was certainly entitled under these facts to a legal determination of its case. Under the facts it was a question of law as to whether appellant could recover for losses shown on the original claim but not at that time pressed. It

was entitled to a court decision as to whether it could recover upon an amended claim.

There was never any suggestion by the court below of dismissing the case for want of jurisdiction, which clearly indicates that said court believed it had general jurisdiction to hear and determine the case.

All claimants who presented claims under the original act were authorized by the 1929 amendment to file petitions in the court below and that court was authorized to pass upon the legal questions. The court had jurisdiction of the parties and of the class of cases to which this particular case belongs.

In the case of *Olson v. Hoffman*, 4 Fed. (2) 263, 264, the Court said:

“Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the *class* of cases to which the particular case belongs. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for, if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches, and the court has power to decide whether the pleading is good or bad. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be.”

See also *Hartford Life Insurance Company v. Johnson*, 268 Fed. 30.

**Secretary of the Interior Wilbur Had Full Authority
to Consent to the Judgment Entered.**

In the case of *Wilbur v. U. S. ex rel Vindicator Con-Gold Min. Co.*, 284 U. S. 231, 235, Mr. Justice Butler, speaking upon the question of power of Secretary of the Interior under this Act, said:

“By section 5 of the Relief Act the Secretary is empowered ‘to adjust * * * and pay such net losses as have been suffered by any person * * * by reason of producing or preparing to produce * * * tungsten in compliance with the request or demand of the Department of the Interior, * * * to supply the urgent needs of the nation in the prosecution of the war.’ ”

And construing the act further, Mr. Justice Butler further said:

“Section 5, the proviso referring to expenditures ‘for or upon property’ containing the minerals, and the amendment of 1921 are plainly broad enough to include net losses resulting by reason of expenditures for the purchase of property and leave no room to doubt that it was the *purpose of Congress* to empower the Secretary to take them into account in arriving at the amount, if any, to be allowed and paid.”

And speaking of the filing of claims and the claimants entitled to the relief, said that “all claimants who * * * have heretofore mailed or filed their claims or *notice in writing* thereof * * * shall be reimbursed.”

The Secretary had the power to pay this loss when the consent judgment was agreed to by his solicitor. If he had the full power to pay, he undoubtedly had the lesser power to agree that the court instruct him upon

the law as to whether the losses incurred for expenditures for the purchase of the property.

This appellant gave *notice in writing* of its losses due to expenditures for purchase of property when it filed its original claim when it answered question 13 (R. 20) that it purchased the property outright for \$75,000. The Secretary knew this at the time his attorney consented to the judgment.

An attorney has authority to bind his client by his consent to a judgment. *Pacific Railroad Co. v. Ketchum*, 101 U. S. 289; *Swift v. United States*, 276 U. S. 311; *Tucker v. Alexander*, 275 U. S. 228.

The 1929 amendment is a remedial statute and should be liberally construed, so as to effectuate the purpose for which it was enacted. *United States v. Cornwall*, 268 Fed. 680; *Bechtel v. United States*, 101 U. S. 597.

In *Tucker v. Alexander, supra*, the taxpayer had made a claim for refund of taxes upon one ground and brought suit for recovery on other grounds than those stated in the claim. Section 3226 of the Revised Statutes provides that "no suit or proceeding shall be maintained * * * for the recovery of any internal revenue tax alleged to have been erroneously or illegally collected * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * *". And the regulations in force when the claim was filed required that "all the facts relied upon in support of the claim shall be clearly set forth under oath."

Beginning on page 230 of the opinion, the Court said:

"During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.

"If the collector and counsel for the government had power to waive an objection to the sufficiency of the description of the claim filed it was waived here, and we need not consider the precise extent of the requirements prescribed by the statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The solicitor general does not urge that the government's possible objection could not be waived but submits the question for our decision.

"Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States. (citing cases.) But no case appears to have held that such objections as that urged here may not be dispensed with by *stipulation* in open court on the trial. The statute and regulations must be read in the light of their purpose. They were devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery * * * We can perceive no valid reason why the requirements of the regulations may not be *waived* for that purpose."

Here the Assistant Solicitor for the Interior Department by consenting to a judgment which was entered by the court waived any irregularities in connection with the procedure before the Department.

It was admitted that a claim was filed and that appellant had suffered losses due to expenditures for purchase of property for supplying the government with tungsten. This Court is familiar with the fact that the Interior Department refused to pay such losses until the Supreme Court of the United States affirmed the decision of this Court in the *Vindicator* case. Whether a formal amendment to Appellant's claim had been filed or whether the Secretary had passed upon the claim were matters of procedure in the department and were matters which the solicitor could waive so long as the statutory requirement of filing "a claim" had been complied with by a claimant.

As to whether a claimant had a right to amend his claim was undoubtedly a "question of law" and was a matter for the court to decide under the 1929 amendment. If a question of law was presented in that respect, the solicitor had the right to pass upon the "sufficiency of the claims" and if he had that right he was also empowered to consent to the judgment. See *Swift v. United States*, 276 U. S. 311, 331, where the court held that the power of the Attorney General to make determinations "includes the power to make erroneous decisions as well as correct ones."

The Claim Was Amended.

A claim can be amended. Income tax claims have often been amended. And this claim was amended. After the Supreme Court of the United States affirmed the decision of this court in the case of *Wilbur v. Vindicator Consolidated Gold Mining Co.*, 284 U. S. 231, the Interior Department mailed out to this appellant a form entitled "Questionnaire". At the top of the

first page in large letters appeared the words: PROPERTY—INTEREST. (R. 38.)

In the original questionnaire (R. 20) Appellant showed the cost of property purchased for this enterprise was \$75,000.00, on which it had paid at that time \$37,500. The claim filed under the amendment (R. 39) shows purchase agreement of \$75,000 and payment then of \$62,500.

In the case of the *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, the court held that a tax claim could be amended, where a seasonable claim had been filed. And it was held that the amendment could be filed under such circumstances "though it be after a time when a wholly new claim would be barred by limitation."

Conclusion.

When the court entered the consent judgment in January, 1932, it adjudged that the agreement made by the parties was legal, that the parties had the legal capacity to enter into the contract and had so contracted. Such a judgment cannot be vacated without the consent of all parties.

The court had jurisdiction of the subject matter and of the parties and by consenting to the judgment all errors were waived.

No motion was made by the appellee to vacate said judgment until April 24, 1935, over 3 years after it was entered. Such motion, if the proper pleading to file, was too late. And the action of the court in attempting to vacate said judgment was void and should be reversed.

A valid judgment cannot be vacated after the expiration of the term of court at which it was entered.

A consent judgment entered by a court which had general jurisdiction of the subject matter and of the parties at the time it was entered, cannot be vacated upon motion to vacate when the motion was filed after the expiration of the term of court.

The Secretary of the Interior when the consent judgment was entered had full authority to settle, adjust and pay all claimants under the provisions of the War Mineral Relief Acts, and such authority included the lesser power to agree to a consent judgment to have the court pass upon the law of the case.

A claim having been filed under the provisions of the original act, which claim gave written notice of the particular losses upon which the amended claim is based, was subject to amendment and entitled the claimant to the right to have both the original and the amended claim passed upon by the court.

The Supreme Court of the District of Columbia retained jurisdiction of the case by merely vacating the judgment previously entered and in not dismissing the case.

Even if the judgment was not valid, the present Secretary of the Interior was guilty of laches in waiting from March 4, 1932 until April 24, 1935 to make his first attempt to vacate or modify said judgment.

Secretary Wilbur had the same authority as the present Secretary has in the settlement of War Mineral claims and when the judgment was consented to by the Solicitor, the case then being before the court for trial, his consent was binding upon his successor in office.

The Statute being a remedial statute must be liberally construed.

The judgment having been entered by consent is en-

titled to the construction most favorable to the appellant.

The Supreme Court of the United States held in the *Vindicator* case that it was the purpose of Congress to empower the Secretary of the Interior to take losses due to purchase of property into account, and this judgment merely directed the Secretary to *consider* those losses in making his decision on the claim.

The Supreme Court of the District had the power under the law and the facts to render a judgment in this case, and, whether its judgment was correct or erroneous, does not invalidate it.

Wherefore it is respectfully submitted that the order of June 25, 1935 should be reversed for error in vacating the final judgment after the expiration of the term and for error in overruling appellant's motion to strike appellee's motion to vacate and in granting appellee's motion.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAR 5 - 1936

Henry H. Hodges

No. 6554—Special Calendar ^{CLERK}

**In the United States Court of Appeals
for the District of Columbia**

JANUARY TERM, 1936

THE UNITED STATES OF AMERICA EX REL. TUNG-
STEN REEF MINES COMPANY, A CORPORATION, AP-
PELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
APPELLEE

BRIEF OF APPELLEE

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**In the United States Court of Appeals
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JANUARY TERM, 1936

No. 6554—Special Calendar

**THE UNITED STATES OF AMERICA EX REL. TUNG-
STEN REEF MINES COMPANY, A CORPORATION, AP-
PELLANT**

v.

**HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
APPELLEE**

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal by the Tungsten Reef Mines Company from an order of the Supreme Court of the District of Columbia vacating, for lack of jurisdiction over the subject matter of the suit, an order for writ of mandamus in a War Minerals Relief case, prior to the issuance of the writ.

THE FACTS

On May 23, 1919, the Tungsten Reef Mines Company filed a War Minerals Relief claim (R. 17)

seeking an award pursuant to the provisions of the act of March 2, 1919 (40 Stat. 1274), for net operating losses sustained in producing or preparing to produce tungsten ore. The claimant corporation specifically disclaimed any claim for loss by reason of purchase of mining property. In the petition to the War Minerals Relief Commission for a hearing (R. 29, 30) signed by A. J. Clark, the president of the company, and submitted with the claim, the following statement is made:

No claim is being made covering items of permanent assets, the only elements of charges being the operating costs from May 5, 1918 to November 11, 1918.

In another paragraph it was stated:

We have not included itemization of equipment and machinery because we claim no loss on such equipment and machinery, in that, it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations.

At the hearing before the War Minerals Relief Commission (R. 32) on the claim, in June 1919, Mr. Carson, a witness summoned by the claimant, stated to the Commission: "But no element of the purchase price of the mine enters into this claim", to which Commissioner Moore replied: "I understand that. You want to keep it." A statement of similar character was made by Mr. Carson later in the hearing (R. 33), at which point Commis-

sioner Moore turned to Mr. Clark and asked whether he accepted this version of the claim, and Mr. Clark replied that he did.

On February 10, 1921, the Secretary of the Interior rendered his final decision on the claim presented by the claimant corporation, and made an award of \$15,446.61 (R. 37). The award did not include reimbursement for property losses and was based upon the recommendation of the War Minerals Relief Commission which found (R. 6, 8, 35), "No claim is made herein for property purchased or permanent improvements."

Nine years later claimant filed a petition under the act of February 13, 1929 (45 Stat. 1166), seeking a writ of mandamus directing the Secretary to review its War Minerals Relief claim (R. 2). The petition sought review of the Secretary's final decision which, the petition alleged, denied claimant reimbursement for money expended and obligations incurred in the purchase of mining property. Paragraph VII of the petition (R. 3) alleges that "the Secretary made an award for some of the expenditures made by relator but denied relator an award for said items of loss for purchase of property and costs of mill equipment on the pretext that no claim was made for such expenditures." A copy of the recommendations of the War Minerals Relief Commission containing the finding, "No claim is made herein for property purchased or permanent improvement", was attached to and

made a part of the petition. The Secretary of the Interior answered denying, that he had ruled, as a matter of law, that the alleged loss incurred in the purchase of property was not reimbursable and answering further that no claim was made by the relator for said alleged loss and that said items of alleged loss were knowingly and intentionally omitted from the claim by the petitioner.

Immediately following the decisions of the Supreme Court in *Wilbur v. Vindicator* and *Wilbur v. Chestatee*, 284 U. S. 231 and 237, respectively, holding that losses sustained in the purchase of mining property and interest expenditures and obligations, if properly claimed, were reimbursable, an order for a writ of mandamus, inadvertently consented to by the predecessor in office of the present appellee, was entered in this cause, directing the Secretary to ascertain whether the relator (appellant here) had incurred a net loss by reason of the purchase of mining property and payment of interest (R. 10, 11).

Subsequent to the entry of said order for writ of mandamus on June 2, 1932, the appellant filed with the War Minerals Relief Commission a so-called amended claim (R. 38) for property loss. This so-called amended claim has been twice rejected (R. 45, 47) by the predecessor in office of the present appellee on the grounds that the item of alleged property loss was not a part of the original claim, was expressly disclaimed therein and that the

so-called amended claim was not filed within the time and manner provided by the act of March 2, 1919 (40 Stat. 1274). Said act provided for awards on only those claims filed within three months of the date of the act; and it made no provision whatsoever for amendment of claims years after the Secretary of the Interior had rendered his final decisions on them.

On April 24, 1935, the appellee filed a motion to vacate the order for a writ of mandamus upon the ground that the court had no jurisdiction over the subject matter of the suit, and that said order was accordingly null and void.

An order was entered on June 25, 1935, by the Supreme Court of the District of Columbia, setting aside the order for a writ of mandamus, which had not been issued. The Tungsten Reef Mines Company has appealed from this order.

QUESTIONS PRESENTED

1. Whether an appeal may be had as a matter of right from an interlocutory order of the Supreme Court of the District of Columbia, vacating another order entered at a prior term of court.

2. Whether the Supreme Court of the District of Columbia, after entering an order on January 15, 1932, for writ of mandamus, directing the Secretary to ascertain whether the appellant here incurred a net loss by reason of the purchase of mining property had power to enter the order of

January 25, 1935, vacating the prior order on the grounds that the decree was void, the court having no jurisdiction of the subject matter of the controversy.

OUTLINE OF ARGUMENT

I. The appeal should be dismissed for lack of jurisdiction on the ground that the order of the Supreme Court of the District of Columbia is not appealable as a matter of right.

II. The Supreme Court of the District of Columbia lacked jurisdiction to enter the order for the issuance of a writ of mandamus.

(a) The lower court's jurisdiction was limited to the review of final decisions of the Secretary of the Interior upon questions of law.

(b) The Secretary of the Interior in his final decision of February 10, 1921, did not rule on the question of law whether appellant was entitled under the act to compensation for losses suffered in the acquisition of permanent assets.

(c) The attempt to amend the claim subsequent to entry of the order for writ of mandamus could not cure a jurisdictional defect existing at the time of filing of petition for said writ.

(d) Jurisdiction of the subject matter cannot be conferred on a court by consent.

III. The jurisdictional defect in the cause was apparent on the record at the time of entry of the consent order.

IV. Judgments rendered by courts which do not possess jurisdiction are void and subject to attack at any time.

V. No valid objection on the basis of estoppel or laches can be made against the appellant.

ARGUMENT

I

The appeal should be dismissed for lack of jurisdiction on the ground that the order of the Supreme Court of the District of Columbia is not appealable as a matter of right

The jurisdiction of the Court of Appeals, in so far as the present appeal is concerned, is set forth in section 7 of the act approved February 9, 1893, as amended (Title 18, Section 26, District of Columbia Code) and reads as follows:

Jurisdiction.—Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, may appeal therefrom to the said court of appeals; and upon such appeal the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections. Appeals shall also be allowed to said court of appeals from all interlocutory orders of the supreme court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment

of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said court of appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal. (Feb. 9, 1893, 27 Stat. 435, c. 74, sec. 7; Mar. 3, 1901, 31 Stat. 1225, c. 854, sec. 226; Mar. 3, 1921, 41 Stat. 1312, c. 125, sec. 12.)

The above section classifies appeals from the Supreme Court of the District of Columbia into two main categories: (1) appeals as matters of right; (2) appeals as matters of grace. Any final order, judgment, or decree of the Supreme Court of the District of Columbia may be appealed as a matter of right, as also may any interlocutory order which changes or affects the possession of property. Appeals from all other interlocutory orders of the Supreme Court of the District of Columbia are discretionary with the Court of Appeals and may be allowed upon a showing to said court by petition that "it will be in the interest of justice to allow such appeal."

The order of the Supreme Court of the District of Columbia upon which this appeal is based is merely an order vacating the decree for the issuance of a writ of mandamus which had been obtained by consent. The petition for writ of mandamus was not dismissed and this cause is now pending in the Supreme Court on petition and

answer. In the event that the order appealed from is sustained by this court on the merits of the said order, appellant could then return to the lower court, join issue on the petition for writ of mandamus and answer or amend his petition and reach an issue thereon. Then following a judgment below an appeal could again be taken to this court. Thus, it is seen that the appellant could insist on this court reviewing the cause of action on two separate occasions. And in this manner the underlying purpose for prohibiting appeals from interlocutory orders—to prevent multifarious appeals in the same cause of action—would be frustrated.

It seems clear that the order vacating the consent decree was not in any sense a final order. In discussing the general rule prohibiting appeals from interlocutory orders in this country, Chief Justice Taney in the case of *Forgay v. Conrad*, 6 How. 201 (47 U. S.) made the following observation (p. 205) :

* * * In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal.

In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right

of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal; and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal as practised in the English chancery jurisdiction and as restricted by the act of Congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

In *Keystone Iron Co. v. Martin*, 132 U. S. 91, the term "final decree" is defined (p. 93):

We think that the decree is not a final decree, and that this court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire con-

troversy between the parties. The bill prays only for an injunction and an account of the quantity and value of the ore taken from the land by the defendant. The injunction is granted, but the account remains to be taken. The case is not one where nothing remains to be done by the court below except to execute ministerially its decree. In all cases like the one before us this court has uniformly held that the decree was not final and was not appealable.

In *La Bourgogne*, 210 U. S. 95, the same definition was adopted. The court, *per* Mr. Justice White, stated (p. 112):

* * * The rule * * * for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties * * *.

In view of the foregoing it would seem indisputable that the order appealed from was not a final order, judgment or decree of the lower court. Moreover, it is too clear for argument that this was not an interlocutory order in which the possession of property was changed or affected. The conclusion is inevitable that this appeal is defective, since all other interlocutory orders are appealable only as a matter of grace, upon petition to this court, and since no petition was made to this court requesting it to exercise its discretion and allow the appeal as a matter of grace, the appellant

merely noting an appeal from the order vacating the judgment below (R. 52).

This analysis finds support in the decisions of this court. In the case of *R. L. Polk & Co. v. Smolik*, 44 App. D. C. 55, an order was entered by the Supreme Court of the District of Columbia vacating a judgment of dismissal of a case and reinstating the same. An appeal from such order was sought by petition and not as a matter of right. In the opening sentence of the opinion it was made clear that this was an appeal as a matter of grace and that the order was an interlocutory order (p. 55):

This is an appeal allowed by the court from an interlocutory order vacating the judgment of dismissal of a case and reinstating the same.

This court has held that an appeal as a matter of right does not lie from an order denying a motion to vacate judgment.

Swenk v. Nicholls, 39 App. D. C. 350.

Dante v. Bagby, 39 App. D. C. 516.

Doyle v. District of Columbia, 45 App. D. C. 90.

International Bank v. Securities Corp., 59 App. D. C. 72.

In view of the fact that an appeal from an interlocutory order of this nature is granted on petition only, the failure to file such a petition is fatal to the appeal. In *Dieterich v. Dieterich*, 48 App. D. C. 356, it was held, in dismissing an appeal from an

order refusing permission to amend an answer and cross bill and dismissing both (pp. 357, 358) :

* * * a special appeal is granted on petition only. * * *

The appeal is dismissed for want of jurisdiction.

While it must be conceded that the better procedure for attacking an appeal on jurisdictional grounds is by motion, it is submitted that this defect of the appeal may be brought out at this time. This court, *per* Mr. Justice Van Orsdel, in the case of *Metzger v. Kelly*, 34 App. D. C. 548, said (p. 549) :

This is a mere interlocutory order, sustaining a demurrer. No final judgment was entered in the court below; hence, the appeal is fatally defective. The practice is so uniform that an appeal will not lie from such an order, that discussion or citation of authority is unnecessary. No objection on this point was made by counsel, but the court, on its own motion, will notice such a patent defect in the record, and govern its action accordingly. The appeal is dismissed, with costs, and it is so ordered.

As is shown above, the order below vacating the consent decree was an interlocutory order and was appealable only as a matter of grace by petition to this court. No such petition was filed, appeal being sought as a matter of right. Therefore, the appeal is defective on the grounds of lack of jurisdiction and should be dismissed.

The Supreme Court of the District of Columbia lacked jurisdiction to enter the order for the issuance of a writ of mandamus

- (a) The lower court's jurisdiction was limited to the review of final decisions of the Secretary of the Interior upon questions of law

The privilege of filing claims with the Government for losses "suffered by any person, firm or corporation, by reason of producing or preparing to produce, either manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war" was granted by the Congress by the act of March 2, 1919 (40 Stat. 1274). This statute authorized the Secretary of the Interior "to adjust, liquidate, and pay such net losses" as had been suffered by any such claimant. Moreover, it was expressly provided: "That nothing in this section shall be construed to confer jurisdiction upon any Court to entertain a suit against the United States." (40 Stat. 1275.) And the Supreme Court of the United States in *Work v. Rives*, 267 U. S. 175, definitely held that under this act the decisions of the Secretary of the Interior on War Minerals Relief claims were conclusive as to both

law and fact and were not subject to court review. The court, *per* Mr. Chief Justice Taft, stated (p. 182) :

* * * It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. Final against whom? Against the claimant. He could not resort to court to review the Secretary's decision. This was expressly forbidden. * * *

By virtue of the act of February 13, 1929 (45 Stat. 1166), any claimant who had properly filed with the Secretary a claim under the act of March 2, 1919, was given the right to petition the Supreme Court of the District of Columbia to review the final decision of the Secretary upon any question of law. And jurisdiction to hear such suits was conferred upon the Supreme Court of the District of Columbia by section 3 of the act. The pertinent provisions of the act of February 13, 1929, read:

That any claimant who has heretofore filed with the Secretary of the Interior within the time and manner provided by existing law a claim under said Acts generally known as the War Minerals Acts (Fortieth Statutes, page 1272, and its amendments) may within one year from the date of the passage and approval hereof *petition the Supreme Court of the District of Columbia to review the final decision of the Secretary of*

the Interior upon any question of law which has arisen or which may hereafter arise in the adjustment, liquidation, and payment of his claim under said Acts, but the decision of the Secretary of the Interior on all questions of fact shall be conclusive and not subject to review by any court. [Italics supplied.]

* * * * *

SEC. 3. Jurisdiction is hereby conferred upon the Supreme Court of the District of Columbia, as a district court of the United States, to hear and determine all such suits and enter all orders, judgments, and decrees therein, subject to the usual right of appeal by either party to the Court of Appeals of the District of Columbia, whose final judgment may be reviewed by the Supreme Court of the United States by petition for certiorari or by appeal as provided by law and the rules of the court.

In view of the foregoing it is patent that jurisdiction was conferred on the Supreme Court of the District of Columbia to review only final decisions of the Secretary of the Interior upon questions of law. And all decisions of the Secretary on questions of fact were specifically exempted from judicial review. Therefore, when no decision of law has been rendered by the Secretary, the court is without jurisdiction to review the action of the said Secretary.

- (b) The Secretary of the Interior in his final decision of February 10, 1921, did not rule on the question of law whether appellant was entitled under the act to compensation for losses suffered in the acquisition of permanent assets

The item of alleged loss in the purchase of property, which was the subject matter of the order entered by the court below on January 15, 1932, was not included as part of appellant's original application for award pursuant to the act of March 2, 1919. In fact appellant specifically disclaimed any right to compensation for losses so incurred.

In paragraph VIII of the petition for hearing before the War Minerals Relief Commission on the claim of the Tungsten Reef Mines Company, dated May 23, 1919, the appellant stated: "No claim is being made covering items of permanent assets" (R. 3, 8, 30). In paragraph XIV of this petition it was also stated: "We have not included itemization of equipment and machinery because we claim no loss on such equipment and machinery, in that, it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations" (R. 31).

Moreover, in the recommendation of the War Minerals Relief Commissioners to the Secretary of the Interior, approved by the Secretary in his award, the following statement appears:

No claim is made herein for property purchased or permanent improvement. The only elements charged are the operating costs from May 5, 1918, to November 11, 1918 (R. 6, 8, 35).

Furthermore, in a transcript of the hearings on this claim at Los Angeles before the War Minerals Relief Commission, the following statements are found:

Mr. CARSON. But no element of the purchase price of the mine enters into this claim.

* * * * *

Commissioner MOORE. I understand that. You want to keep it.

* * * * *

Mr. CARSON. Would it be allowable for me to clearly state for the record what the Tungsten Reef claim consists of, and the Standard claim consists of?

Chairman SHAFROTH. I think you better do so.

Mr. CARSON. In the Tungsten Reef mines the claim is only for the overhead and actual expenses of making test runs from the time of starting to November 11, 1918.

Commissioner MOORE. You accept this statement as your version of it, Mr. Clark?

Mr. CLARK. Yes, sir. (R. 32, 33.)

As is shown in the affidavit of Harold L. Ickes, Secretary of the Interior, filed April 24, 1935, the Mr. Clark there testifying was A. J. Clark, President of the Tungsten Reef Mines Company (R. 15). And Mr. Carson was a witness called by the company.

Thus it is clear that appellant in filing its claim with the Secretary of the Interior on February 10, 1921, did not include losses sustained in the pur-

chase of property, equipment, and machinery. And it is equally clear, therefore, that there was not and could not have been a final decision by the Secretary of the Interior upon the question of law whether the appellant was entitled pursuant to the act of March 2, 1919, to compensation for losses incurred in the purchase of property, equipment, and machinery. And only by virtue of such a decision could the lower court have had jurisdiction to enter the order of January 15, 1932.

- (c) The attempt to amend the claim subsequent to entry of the order for writ of mandamus could not cure a jurisdictional defect existing at the time of filing of petition for said writ

As has been shown above, the lower court did not possess jurisdiction of the subject matter on February 7, 1930, the date of the filing of petition for review of the decision of the Secretary of the Interior and for mandamus.

The act of March 2, 1919, limited the time for the filing of claims by the following proviso:

That said Secretary shall consider, approve, and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act. (40 Stat. 1274.)

And not until June 2, 1932, six months after entry of the consent decree by the court below and 13 years after the period for the filing of claims had expired, did appellant attempt to present to the Secretary of the Interior a claim for losses incurred

in the purchase of property, equipment, and machinery.

Even though we assume, though not admitting, which we most emphatically do not, that this claim of June 2, 1932, constituted an amendment to the original claim of May 23, 1919,¹ it is clear beyond peradventure of doubt that the jurisdictional defect of the Supreme Court of the District of Columbia was not and could not be cured by such action. It is so well settled by the Supreme Court of the United States as to render argument unnecessary

¹ The act provides no method for amendment of claims. The allowance of awards being wholly statutory, it follows from the absence of any provision for amendment that it was not the intent of Congress to permit such amendments, particularly if such amendments be attempted over 10 years subsequent to the filing of the original claim. Moreover, the right to amend in the present case where there is no statutory authority cannot be greater than exists in analogous situations in pleading where the right to amend is statutory. In pleadings of the latter kind amendments are permitted to correct errors or inadvertent mistakes. *Shields v. Barrow*, 17 How. 130, 144. Such amendment, however, cannot be used to present a new cause of action such as one which cannot be supported by the same evidence as the first cause, or where the same measure of damages does not apply to each. *Salyers v. United States*, 257 Fed. 255, C. C. A. 8. *Kramer v. Gille*, 140 Fed. 682. *Painter v. New River Mineral Co.*, 98 Fed. 544.

Obviously the second application was not filed to correct a mistake within the rule above stated, for the disclaimer of property items was by deliberate choice (R. 6, 8, 35). Likewise, the application falls short of being an amendment within the purview of the "measure of damages" test, for the claim is dependent not only on more evidence but different evidence. (See *infra*, pp. 26, 27.)

that the jurisdiction of a court depends upon the situation existing at the time of the institution of the suit. This doctrine is unequivocally established by the case of *Minneapolis and St. Louis R. R. Co. v. Peoria Ry.*, 270 U. S. 580.

The facts of *Minneapolis and St. Louis R. R. Co. v. Peoria Ry.*, *supra*, are so clearly analogous to the case at bar as to justify a short résumé of that situation. Suit was filed by the Minneapolis and St. Louis Railroad Company on August 6, 1925, seeking an injunction based upon an order of the Interstate Commerce Commission dated April 13, 1922. On December 22, 1922, the Interstate Commerce Commission had vacated its order of April 13, 1922. Subsequent to the filing of the suit the Interstate Commerce Commission, on November 10, 1925, reinstated the order of April 13, 1922. It was contended by the Minneapolis and St. Louis Railroad Company that the reinstatement of this order after the filing of the suit gave the court jurisdiction which it lacked when the suit was filed. The Supreme Court of the United States, in rejecting this contention, said (p. 586) :

The later facts alleged could not conceivably affect the result of the case before us. The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought. *Mollan v. Torrance*, 9 Wheat. 537; *Anderson v. Watt*, 138 U. S. 694.

The Supreme Court, in *Minneapolis and St. Louis R. R. Co. v. Peoria Ry.*, *supra*, cited as au-

thority for this principle cases in which Federal jurisdiction was dependent upon diversity of citizenship and where the plaintiff, subsequent to the filing of the suit, moved to the State where defendant resided. In those cases and in *Dunn v. Clarke*, 8 Pet. 1; *Morgan v. Morgan*, 2 Wheat. 290, and *Clarke v. Mathewson*, 12 Pet. 164, it was held that jurisdiction established at the commencement of a suit is not divested by subsequent acts of the parties. The legal doctrine is definite to the effect that jurisdiction depends upon the facts existing at the commencement of the suit and that jurisdiction cannot be conferred or divested by events occurring subsequent to the filing of the suit.

Appellant's attempt to file an amended claim more than two years after the petition for review of the Secretary's decision and for mandamus was filed, and six months after the consent decree was entered by the court below, did not and could not, therefore, give the lower court jurisdiction over the subject matter of this cause, a jurisdiction it lacked at the time petition was filed and at the time the order therein was entered.

**(d) Jurisdiction of the subject matter cannot be conferred on a court
by consent**

Although the order for writ of mandamus of the Supreme Court of the District of Columbia was entered by consent of the attorneys for appellant and appellee, said consent did not and could not

confer upon said court the jurisdiction that was prerequisite to the validity of said order.

The doctrine is well established by decisions of this court and of the Supreme Court of the United States that consent of the parties cannot operate as a waiver of jurisdictional defects of the court.

Chicago, Burlington and Quincy Railway Co. v. Willard, 220 U. S. 413.

M. C. & L. M. Railway Co. v. Swan, 111 U. S. 379.

Ayers v. Watson, 113 U. S. 594.

Willard v. Wood, 135 U. S. 309.

La Joya Grant v. Belen Land Grant, 242 U. S. 595.

Wallace v. Degree, 38 App. D. C. 145.

United States v. I. C. C., 56 App. D. C. 40.

In *Chicago, Burlington and Quincy Railway Company v. Willard*, *supra*, the court said (pp. 421, 427) :

We are of opinion that the Circuit Court could not properly take cognizance of this case. * * *

* * * * *

The silence of the parties, at the trial, or in the appellate court, on the question of jurisdiction could not, in disregard of the judiciary act, confer authority on the Circuit Court to try the case. * * *

In the case of *M. C. & L. M. Railway Co. v. Swan*, *supra*, the following observation was made by the court (p. 384) :

* * * the judicial power of the United States must not be exerted in a case to which

it does not extend, even if both parties desire to have it exerted. * * *

In *Ayers v. Watson, supra*, the court said (p. 598):

* * * Diverse State citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed.

Also see *United States v. Mayer*, 235 U. S. 55, where the court stated (p. 70):

As the District Court was without power to entertain the application, the consent of the United States Attorney was unavailing. * * *

In view of these decisions it must be conceded that a court cannot acquire jurisdiction by consent of the parties where there is in fact no jurisdiction over the subject matter of the litigation.

III

The jurisdictional defect in the cause was apparent on the record at the time of entry of the consent order

As has been shown above, appellant, in presenting its claim originally on May 23, 1919, and by statements of its officers at the hearing on said claim before the War Minerals Relief Commission, expressly disclaimed any right to compensation for losses suffered in the purchase of permanent assets.

Since this issue was not raised no opportunity was afforded the Secretary to render a decision of law on this question. And in the absence of such decision the court below had no jurisdiction to enter the consent decree of January 15, 1932.

Moreover, it is submitted that this jurisdictional defect was apparent on the face of the petition and the exhibit attached thereto and made a part thereof and the answer, all of which were in the file of the case and constituted part of the record at the time the consent order was entered. Examination of the appellant's petition reveals that it does not contain any allegation that a claim was made before the Secretary of the Interior for loss incurred in the purchase of mining property. As has just been stated, in the absence of such a claim there could not be any decision of the Secretary denying award for property loss as a matter of law. And in the absence of a decision denying award for property loss, as a matter of law, the Supreme Court of the District of Columbia could not have had jurisdiction to enter the order of January 15, 1932.

Considering the petition in detail, in paragraph V it is alleged merely that:

* * * In said petition submitted on said claim Tungsten Reef Mines Company set up the facts showing that it had made expenditures and incurred obligations which were incurred in good faith upon the purchase of property containing tungsten and the purchase of equipment for a mill for the con-

centration of the tungsten mined. * * *
(R. 3.)

There is a conspicuous absence in this paragraph of any allegation that, in said petition on said claim, the appellant claimed losses incurred in the purchase of property, equipment, and machinery.

In paragraph VI of the petition it is alleged that the appellant in its claim showed, as part of its expenditures made and obligations incurred, an expenditure for the purchase of property and mill equipment (R. 3). Again, the petitioner did not allege that a claim had been made for these expenditures, but instead studiously drafted this paragraph in accordance with the facts so as to avoid alleging a claim that in fact had never been made.

Moreover, the mere statement of appellant in this paragraph of the petition that the Tungsten Reef Mines Company had submitted as a part of its original claim with the Secretary of the Interior "facts showing that it had made expenditures and incurred obligations which were incurred in good faith upon the purchase of property containing tungsten and the purchase of equipment for a mill" is of little significance. *Evidence of an entirely different nature than that necessary to prove operating losses would be necessary in order to support the contention that losses had been suffered by reason of purchase of property.* In order to support such a claim proof of capital or original expenditures and proof of salvage value, which proof

does not and cannot rest on mere bookkeeping entries, would be necessary. As the appellant admits, in the original petition to the Secretary of the Interior requesting compensation for losses sustained, the Tungsten Reef Mines Company merely set forth the actual expenditures and obligations that had been incurred in the purchase of such property. None of the other facts necessary to show loss because of that purchase were shown or alleged to have been shown.

In paragraph VII of the petition, with respect to the final decision and award of the Secretary, the petitioner alleged that:

* * * the Secretary made an award for some of the expenditures made by relator but denied relator an award for said items of loss for purchase of property and costs of mill equipment on the pretext that no claim was made for such expenditures. A copy of his decision is attached hereto, made a part hereof and marked Exhibit A (R. 3).

The exhibit referred to and made a part of the petition is the recommendation of the War Minerals Relief Commission to the Secretary of the Interior, which was approved by him in his award (R. 5). In the third paragraph of this exhibit it is clearly stated:

No claim is made herein for property purchased or permanent improvement. The only elements charged are the operating costs from May 5, 1918, to November 11, 1918 (R. 6).

The allegation in this paragraph of the petition that the Secretary of the Interior denied the appellant (relator) an award for said items of loss for purchase of property is not preceded by any allegation that relator claimed a property loss. Furthermore, the allegation that the alleged denial of the Secretary was made on the "pretext that no claim was made for such expenditures" creates only an implication which stands isolated without the support of any allegation that such a claim was made and without the allegation of facts so to indicate. *Finally, and most important, exhibit A attached to the petition and made a part thereof, shows a finding of fact by the Secretary that no claim was made for property or permanent improvements.* The act of February 13, 1929, specifically provided that "the decision of the Secretary of the Interior on all questions of fact shall be conclusive and not subject to review by any court" (45 Stat. 1166). Clearly the Secretary's finding that no claim was made for property or permanent improvements was a finding of fact which was and is conclusive.

The allegations in paragraphs VIII and X of the petition, to the effect that these items of loss were denied for the sole reason that the Secretary of the Interior held as a matter of law that such losses were not included within the provisions of the War Minerals Relief Act, are clearly contradicted by the admissions in paragraphs V and VI of the petition

and the finding in the recommendation for award adopted by the Secretary of the Interior and made a part of the petition, that no claim was made for such losses (R. 3, 4, 6).

It must be conceded that, even if a claim was presented to the Secretary for certain losses, including an item showing losses incurred in the purchase of property, and the Secretary refused to render a decision on this particular item on the basis that no such claim was made, it could not be held that the Secretary had rendered a final decision on the question of law whether the said particular claimant was entitled to compensation for this item. The determination whether a particular item was or was not included in a claim is certainly a factual determination and all such decisions are specifically exempted by the act of February 13, 1929, from review by the courts. Remedy would have to be obtained elsewhere, to wit, from Congress, for an improper determination of fact on the part of the Secretary.

In view of the foregoing, it is respectfully submitted that the jurisdictional defect in the cause was apparent on the face of the petition at the time that the order of January 15, 1932, was entered.

It should also be noted that the jurisdictional defect was clearly apparent in the answer filed by the Secretary of the Interior on March 8, 1930 (R. 7, 8, 9).

In paragraph 5 of this answer the following quotation from the appellant's petition of May 23,

1919, seeking compensation from the United States for losses suffered, was set forth:

No claim is being made covering items of permanent assets, the only elements of charges being the operating costs from May 5, 1918, to Nov. 11, 1918 * * *.

We have not included itemization of equipment and machinery because we claim no loss on such equipment and machinery, in that, it is the purpose of this company to operate the mine to its capacity at such time as the market will warrant such operations. (R. 8.)

Paragraph 10 denies that in adjusting and liquidating the appellant's claim the Secretary of the Interior held as a matter of law that losses in purchasing property and mill machinery are not reimbursable (R. 8, 9).

Paragraph 12, after reviewing the history of the claim concludes:

* * * having stated its claim and having voluntarily accepted the settlement made, the petitioner is estopped from reopening the matter, and is concluded from saying that the Secretary of the Interior committed error of law in rejecting and disallowing certain items of alleged loss, when in truth and in fact no such items of alleged loss were included in the claim, but, on the contrary, were knowingly and intentionally omitted from said claim. (R. 9.)

Considering the petition and answer together it is manifest from the admissions in the petition of

the appellant, the finding shown in the exhibit attached to and made a part of the petition, the allegations in the answer and the quotation in the answer from the appellant's original claim, that no claim was made by the appellant for property losses. At the time the consent order was entered the record in the case clearly showed that no such claim had been made and that, therefore, the lower court was without jurisdiction.

IV

Judgments rendered by courts which do not possess jurisdiction are void and subject to attack at any time

In view of the decisions holding that jurisdiction cannot be presumed nor even inferred by the courts of the United States and that the necessary jurisdictional allegations must appear in the pleadings, it is manifest that the order of January 15, 1932, was void at the time it was entered. *Continental Insurance Co. v. Rhoads*, 119 U. S. 237; *Ex parte Smith*, 94 U. S. 455; *Robertson v. Cease*, 97 U. S. 646.

Although the general rule exists that no court can reverse its own final decrees or judgments for errors of fact or law after the term in which such judgments have been rendered (*Bronson v. Schulten*, 104 U. S. 410), it must also be admitted that certain well-defined exceptions to this general rule have been adopted by the Federal courts.

See:

Cameron v. M'Roberts, 3 Wheat. 591.

Bank v. Wistar, 3 Pet. 431.

The Palmyra, 12 Wheat. 1.

Wetmore v. Karrick, 205 U. S. 141.

And a very well recognized exception to this general rule is that judgments rendered by courts without jurisdiction of the subject matter are void and subject to attack at any time.

Vallely v. Northern Fire & Marine Ins. Co., 254 U. S. 348.

Ex parte Rowland, 104 U. S. 604.

United States v. Davis, 56 App. D. C. 46.

United States v. Turner, 47 F. (2d) 86, C. C. A. 8th.

Plymouth County Trust Co. v. MacDonald, 53 F. (2d) 827, C. C. A. 1st.

Johnson v. North Star Lumber Co., 206 Fed. 624, C. C. A. 9th.

Phebus v. Search, 264 Fed. 407, C. C. A. 8th.

Moore v. Town of Edgefield, 32 Fed. 498, D. C. S. C.

Clark v. Arizona Mut. Savings & Loan Ass'n, 217 Fed. 640, D. C. Ariz.

Pollitz v. Wabash R. Co., 180 Fed. 950, D. C. N. Y.

Also see:

Hamilton v. Brown, 161 U. S. 256.

Elliott v. Peirsol, 1 Pet. 328, 340.

Shriver's Lessee v. Lynn et al., 2 How. 43, 59.

Since the Supreme Court of the District of Columbia did not have jurisdiction of the subject

matter, presented by appellant's petition for writ of mandamus, it is submitted that the consent order entered January 15, 1932, was void and subject to attack at a subsequent term of court.

In *Ex parte Rowland, supra*, the Supreme Court of the United States held that a writ of habeas corpus should issue releasing the petitioners being held for contempt in not obeying a void writ of mandamus issued six years prior thereto. In the course of its opinion the court stated (p. 617):

It follows, that if the command of the writ against the commissioners was what the Circuit Court has construed it to be, it was in excess of the jurisdiction of the court, and consequently void. If the command of the writ was in excess of jurisdiction, so necessarily were the proceedings for contempt in not obeying. We are led, therefore, to the conclusion that the order of the court under which the marshal holds the petitioners in custody was a nullity, and that a writ of *habeas corpus* should issue as prayed for, unless the parties are willing that an order of discharge shall be entered without further proceedings.

In the case of *Vallely v. Northern Fire & Marine Ins. Co., supra*, an insurance company had been adjudged an involuntary bankrupt by its creditors at a prior term of court. The bankruptcy act under question specifically stated that its provisions did not apply to insurance companies. At a subsequent

term of court a motion to vacate the judgment on the ground that the court was without jurisdiction and the judgment a nullity, was allowed. On appeal the Supreme Court of the United States sustained the order vacating the judgment below. In the course of its opinion the court stated (pp. 353, 354, 356):

* * * Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. * * *

* * * * *

For a court to extend the act to corporations of either kind is to enact a law, not to execute one.

Moreover, this court has recognized the doctrine that a void judgment may be vacated at a subsequent term.

In *MacFarland v. Saunders*, 25 App. D. C. 438, it was stated (pp. 441, 443):

* * * As to the question of laches, it seems to be conceded by appellants that a court has power, after the expiration of one or more terms at which a judgment or decree was entered, to open or vacate it if such judgment or decree be void. * * *

* * * He could move to vacate it at

any time, or he could wait until an attempt was made to enforce it, and then resist such enforcement so far as it related to his property. * * *

And in the case of *United States v. Davis, supra*, this court held a judgment void and subject to attack at any time because the court rendering such decree was without jurisdiction and this fact was apparent upon the face of the record. It was stated (p. 48):

It follows that the Supreme Court of the County of New York was without jurisdiction to enter the judgment relied upon by the present appellant, and since that fact is apparent upon the face of the record the appellee was entitled to treat it as a nullity. * * *

And the case of *Vallely v. Northern Fire & Marine Ins. Co., supra*, was not only cited with approbation but relied upon by this court in order to reach this conclusion.

In view of the foregoing it seems clear that where a final decree, such as the consent decree in question here, is entirely void for want of jurisdiction, the power to vacate it or set it aside is not limited to the term for which it was rendered but may be exercised at a succeeding term, and that the motion to vacate was therefore properly allowed by the lower court.

Appellant in its brief relies heavily on the case of *Swift v. United States*, 276 U. S. 311. It is re-

spectfully submitted that this case is clearly distinguishable and not controlling on the case at bar. In the *Swift* case a consent decree had been obtained and at a subsequent term of court a motion to vacate the judgment was refused. As was pointed out by the court, *per* Mr. Justice Brandeis, the injunction sought to enjoin anticipated acts of the defendants as well as past acts in violation of the Anti-Trust Laws. And no denial was made at the trial of that case originally or later in the motion to vacate that certain anticipated acts could not be enjoined. These facts were alleged and accepted by both parties to the litigation throughout. Therefore, the court having general jurisdiction over violations of the Anti-Trust Laws, had the power to enjoin in that case and as the opinion of the Supreme Court pointed out (p. 331): "The power to enjoin includes the power to enjoin too much."

In the instant case, the court has no general jurisdiction over the question whether War Minerals Relief claims are properly to be denied. Instead its jurisdiction is limited to the review of final decisions of law of the Secretary of the Interior. In this instance the Secretary made no finding of law and consequently there was nothing on which the court might act. In those circumstances it is obvious that the court had no general jurisdiction over the subject matter of this litigation and that the case at bar is clearly distinguished from the

case of *Swift v. United States, supra*. We are not here concerned with a case where a court having jurisdiction exceeds that power with the consent of the parties. Nor are we concerned with a mere error of decision by the court. We contend, to use the language of the Supreme Court of the United States in the *Swift* case, that there was "a want of power to decide" (p. 330). And the lower court lacking jurisdiction, which was apparent upon the face of the record, rendered a void decree which was subject to attack at any time.

V

No valid objection on the basis of estoppel or laches can be made against the appellee

Although the appellant in its brief does not discuss the principle of estoppel or laches, and its applicability to the case at bar, one sentence is contained in its brief (page 16) to the effect that:

the present Secretary of the Interior was guilty of laches in waiting from March 4, 1932, until April 24, 1935, to make his first attempt to vacate or modify said judgment.

The basis of estoppel is that one party has been induced to act or desist from acting to his detriment by the action of the other party. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Nowata Gas v. Henry Oil Co.*, 269 Fed. 742, C. C. A. 8th.

The present case presents no feature on the basis of which an estoppel can be founded, for the juris-

diction was invoked by the appellant, not the Government, and the appellant has in no manner been misled to its detriment. An action to set aside the consent order must necessarily determine the court's actual jurisdiction. On the finding by the lower court that it had no jurisdiction, the appellant was in the same position regarding the claim as though no consent order had been entered. Appellant had not acted in reliance of such order. Nor had he failed to act, to his detriment, in reliance on such order. And no such contention is made by appellant in its brief.

Even if the necessary factual basis of an ordinary estoppel existed, appellant's attempt to invoke the doctrine of estoppel or laches would still be untenable. It is well settled by the decisions of the Supreme Court of the United States that the United States is not estopped by acts of its agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.² In *Pine River Logging Co. v. United States*, 186 U. S. 279, 291, it was shown that an agent of the Indian Department had assented to the construction of a contract asserted by defendants and it was contended that the United States was estopped from setting up a different construction. The court held:

² As shown above, only those claims presented within three months from the approval of the act of March 2, 1919, could be acted upon by the Secretary. To consider claims submitted thereafter would be contrary to the law.

It is unnecessary to inquire what excuses may be made by these officers for thus indirectly approving the construction put upon the contracts by the parties interested, since they could not bind the government in this particular. With the contracts before them they had but one duty, and that was to see that they were honestly and faithfully carried out according to their spirit and letter. No authority had been given them to extend the contracts either as to the quantity or quality of timber to be cut. In fact, they were placed in charge of the operations for the express purpose of seeing that there should be no violation of the contracts in these particulars. They, as well as the parties thereto, were equally bound by its provisions. No discretion had been given them to waive or alter the contracts in any particular. *No conduct of theirs can estop the government from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract. Lee v. Monroe, 7 Cranch. 366; The Floyd Acceptances, 7 Wall. 666; Whiteside v. United States, 93 U. S. 247.* We are therefore of opinion that the defendants cannot take refuge under the consent or acquiescence of the government agent in the disregard of these contracts. [Italics supplied.]

The same defense was urged in *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408, where it was said:

* * * Of this it is enough to say that *the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. Lee v. Munroe, 7 Cranch. 366; Filor v. United States, 9 Wall. 45, 49; Hart v. United States, 95 U. S. 316; Pine River Logging Co. v. United States, 186 U. S. 279, 291.*

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. *This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. [Italics supplied.]*

In view of the restricted jurisdiction given to the lower court by the act of February 13, 1929, the act of any officer of the Government in entering a consent order may be said not to be sanctioned by law where it results in an attempt to concede to the court a nonexistent jurisdiction. Upon application of the doctrine of the foregoing authorities it is clear that the United States cannot be estopped, by the unsanctioned act of its agent, to move to vacate this

order for a writ of mandamus. No more can it be bound by the doctrine of laches on the ground that the Secretary of the Interior was remiss in moving to vacate the consent decree entered at a prior term of court. And since consent of parties cannot confer jurisdiction in a court (*supra*, pp. 22, 23, 24) it must also follow that the inactivity of an executive officer, *per se*, could not do so. As this court stated in *MacFarland v. Saunders, supra* (p. 443):

* * * As to the question of laches, it seems to be conceded by appellants that a court has power, after the expiration of one or more terms at which a judgment or decree was entered, to open or vacate it if such judgment or decree be void. * * *

Moreover, application of this doctrine or an analogous doctrine would be in violation of the fundamental principle on which the Government was founded—the theory of the separation of powers. An act of Congress should not be rewritten by the inaction of an executive officer together with the aid of the judiciary. The proper forum for remedy from such inactivity, in the event of injury resulting, should be the Congress and not the courts.

With these considerations in mind it is readily seen why appellant did not discuss this point but merely stated a conclusion on this question in its brief.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the order of the Supreme Court of the District of Columbia filed June 25, 1935, should be affirmed.

Respectfully submitted.

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No. 6554.

SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA EX REL. TUNGSTEN REEF
MINES COMPANY, a Corporation,
Appellant,

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Appellee.

APPELLANT'S REPLY TO BRIEF OF APPELLEE.

JERRY A. MATHEWS,
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APPELLANT'S REPLY TO BRIEF OF APPELLEE.

In reply to point I of the brief of appellee we submit that this Court has jurisdiction of this appeal because the Supreme Court of the District of Columbia had no jurisdiction to vacate its judgment after the expiration of the term of court at which said judgment was rendered.

One of the cases cited by this Court in support of its opinion in the case of *Polk v. Smolik*, 44 App. D. C.

55, is the case of *Phillips v. Negley*, 117 U. S. 665, where the Supreme Court of the United States considered an appeal from an order of the Supreme Court of the District of Columbia in vacating a judgment rendered at a previous term of court. The point was raised that the order of the court in vacating the judgment was not appealable because it was not a final judgment. The court, however, pointed out the difference between an order vacating a judgment at the same term of court and an order entered at a subsequent term vacating a judgment rendered at a previous term. If the order vacating the judgment is entered at the same term of court it is not a final judgment as the court has the power to vacate its judgments during the term; but an order vacating a judgment which was rendered at a previous term is an action which is in excess of the trial court's jurisdiction and "must be the subject of review by an appellate court."

In *Phillips v. Negley*, *supra*, the court said:

"The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the Supreme Court of the District at special term is one not only within the discretion of that court, but that as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and therefore not reviewable on writ of error. If properly considered the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its propriety; for if it had power to make it and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judg-

ments at the same term at which they were rendered and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of the court to entertain the present writ of error, therefore, necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself."

In view of the fact that the trial court had no power to vacate the judgment after the expiration of the term of court at which it was entered his order was "without jurisdiction on the part of the court making it" and is "the subject of review by an appellate court." The judgment of the court was entered in the instant case on January 15, 1932 (R. 10). The order vacating it was put down on June 25, 1935 (R. 51). About twelve terms of court intervened between the entry of the judgment and the entry of the order vacating it.

Under the uniform decisions of this court and those of the Supreme Court of the United States the trial court had no power to vacate its judgments after the expiration of the term.

Fidelity and Deposit Co. of Maryland v. Hurley,
63 App. D. C. 377.

Taliaferro v. Carter, 63 App. D. C. 304.

Polk v. Smolik, 44 App. D. C. 55.

Sibbald v. United States, 12 Pet. 488.

Phillips v. Negley, *supra*.

Bank of United States v. Moss, 6 How. 31.

Bronson v. Schulten, 104 U. S. 410.

In the case of *Bronson v. Schulten*, *supra*, the court said:

“But it is a rule equally well established that, after the term is ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding, by writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.”

This appeal is not from an interlocutory order but from an order entered by the trial court in excess of authority and without jurisdiction. There has to be an end to litigation at some time and the rule forbidding the modification or vacation of judgments and decrees was established for that purpose. *Moffat v. United States*, 112 U. S. 32.

In *Bank of United States v. Moss*, *supra*, it was said:

“Even where the record of a circuit court did not contain any averments giving jurisdiction, this court has held that, at a subsequent term, after

final judgment, the same tribunal which rendered it could not set it aside on motion.”

In view of the fact that a final judgment was rendered by the trial court on January 15, 1932, and no steps were taken to vacate the same until April 24, 1935, when a motion to vacate was filed by the appellee, the trial court lost its jurisdiction over the case and had no power to vacate said judgment. Under such circumstances appellant was authorized to appeal as a matter of right from the action of the court in vacating a final judgment after the expiration of the term.

The Supreme Court of the District of Columbia Had Full Jurisdiction to Enter the Original Judgment in this Cause.

Jurisdiction was conferred upon the court by Section 3 of the Act of February 13, 1929, Chapter 182, 45 Stat., 1166, which reads as follows:

“Jurisdiction is hereby conferred upon the Supreme Court of the District of Columbia, as a district court of the United States, to hear and determine all such suits and enter all orders, judgments, and decrees therein, subject to the usual right of appeal by either party to the Court of Appeals of the District of Columbia, whose final judgment may be reviewed by the Supreme Court of the United States by petition for certiorari or by appeal as provided by law and the rules of the court.”

Under the broad powers committed to the court by this Act the court had the power to “hear and determine all such suits and *enter* all orders, *judgments* and decrees therein.” Under such circumstances this appellant is not required to rely upon the consent of

the Secretary of the Interior to the original judgment for jurisdiction.

The Act of February 13, 1929, conferred jurisdiction of the *subject matter* of this litigation upon the court. When appellant filed its petition in the court and the Secretary was regularly served with process and brought into the court as a party respondent, the court had jurisdiction of the *parties*. The court having general jurisdiction of the subject matter and of the parties and being authorized by law to enter all judgments and decrees in such cases undoubtedly had the power to enter a consent judgment in this cause.

The appellee does not deny that this appellant suffered losses due to the purchase of the property in question during the War in an effort to supply tungsten in compliance with the request of the Department of the Interior; nor that a petition was filed within one year from the passage and approval of the Act of 1929, nor that appellant filed a claim within the time allowed by law. And at page 37 of the record there appears a copy of the decision of the Secretary of the Interior on said claim.

This case, therefore, meets all jurisdictional requirements. If there are any irregularities in the claim or in the departmental procedure the consent of the parties waives such irregularities. *Swift v. United States*, 276 U. S. 311, 327. In that case one of the contentions of the packers was:

“* * * That the consent decree was without jurisdiction because it was entered without support of the facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent; that jurisdiction can exist only if the transactions complained of are in fact violations of the Act; that merely to allege facts

showing violation of the anti-trust laws is not sufficient; that the facts must also be established according to the regular course of chancery procedure; that this requires either admission or proof; and that, here, there was no admission but, on the contrary, a denial of the allegations of the bill, and a recital in the decree that the defendants maintained the truth of their answers, assert their innocence, and consent to the entry of the decree without any finding of fact, only upon condition that their consent shall not constitute or be considered an admission."

In answer to the above contentions the Court said:

"The argument ignores both the nature of injunctions, already discussed, and the legal implications of a consent decree. * * * Such an error is waived by the consent to the decree."

In the case of *Pacific Railroad Co. v. Ketchum*, 101 U. S. 289, it was said by the Court:

"Parties to a suit have the right to agree to anything they please in reference to the subject matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings."

And again in the same opinion it is said:

"Consent cannot give the courts of the United States jurisdiction but it may bind the parties and *wave previous errors*, if when the court acts jurisdiction has been obtained."

The original questionnaire filed by appellant set forth the facts showing that it had purchased property (R. 20) theretofore employed by it in producing tung-

sten in compliance with the request of an authorized agency of the Government to supply the urgent needs of the nation in the prosecution of the World War. When the attorney for Secretary Wilbur consented to the judgment he had access to the complete departmental files and not to the incomplete excerpts filed by the appellee in this cause.

In *Tucker v. Alexander*, 275 U. S. 228, the court held that certain provisions relating to refund tax claims could be waived, although Section 3226 of the Revised Statutes required compliance with the regulations as a basis for a suit for refund on the claim.

It is respectfully submitted that the trial court had jurisdiction to enter the consent judgment in this case and that its action in vacating the same after the expiration of the term was beyond the power of the court and should be reversed.

Respectfully submitted,

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